

11-1068

No. _____

Supreme Court, U.S.

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**IN THE
SUPREME COURT
OF THE UNITED STATES**

October Term, 1991

LARRY E. EDWARDS and
GARY R. EDWARDS d/b/a
CARL EDWARDS AND SONS
STABLES,

Petitioners,

vs.

UNITED STATES DEPARTMENT
OF AGRICULTURE,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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QUESTIONS PRESENTED

1. Whether the palpation test alone is sufficient to determine if a horse is sore under the Horse Protection Act, or is the test too vague and ambiguous to render the Horse Protection Act unconstitutional?
2. Whether the interpretation of the United States Department of Agriculture that a "sensitive" horse is a "sore" horse under the Horse Protection Act renders the Horse Protection Act unconstitutional as applied to the Petitioners by the United States Department of Agriculture?
3. Whether the actions of the United States Department of Agriculture in having one of its United States Attorneys instruct the government veterinarians and the Designated Qualified Persons (DQPs) that a "sensitive" horse is a "sore" horse, and thereafter having the same United States Attorney prosecute the Hearing of the

Petitioners; and then having the same United States Attorney ask the government veterinarians and designated qualified persons, that he had previously instructed, if the two horses of Petitioners were "sore," were so prejudicial against the Appellants as to violate the Appellants constitutional right to due process?

4. Whether the selective enforcement of the Horse Protection Act by the United States Department of Agriculture against the Petitioners and other Trainers, Owners, Breeders, and Exhibitors of the Tennessee Walking Horse Breed violates the Fifth, Fourteenth and Sixth Amendment constitutional rights of the Petitioners so as to render the Horse Protection Act unconstitutional?

5. Whether the sanctions of two years suspension against each of the Petitioners simultaneously for first time offenders is too harsh and discriminatory penalty when

the Appellants have no other source of income than to be Tennessee Walking Horse Trainers, and further when the normal period of disqualification for first time offenders is one year?



CERTIFICATE OF INTERESTED PERSONS

91-8038; LARRY E. EDWARDS AND GARY R. EDWARDS D/B/A CARL EDWARDS AND SONS STABLES, vs. UNITED STATES DEPARTMENT OF AGRICULTURE

The undersigned, counsel of record for Petitioners LARRY E. EDWARDS AND GARY R. EDWARDS certifies that the following listed parties have an interest in the outcome of this case. These representations are made to enable judges to evaluate possible disqualifications or recusal.

1. HONORABLE JUDGE DOROTHEA A. BAKER
2. GARY R. EDWARDS
3. LARRY E. EDWARDS
4. GARY R. EDWARDS AND LARRY E. EDWARDS
d/b/a CARL EDWARDS AND SONS STABLES
5. DONALD TRACY, ESQ.
6. UNITED STATES DEPARTMENT OF AGRICULTURE
7. LESLIE K. LAGOMARCINO, ESQ.
8. G. THOMAS BLANKENSHIP, ESQ.
9. MARK G. TRIGG, ESQ.

10. JEFFREY W. KELLY, ESQ.
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Appellants want this Court to take judicial
notice of the following:

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OPINIONS BELOW

The opinion of the Eleventh Circuit
Court of Appeals of the United States,
attached hereto in addendum, is not offici-
ally reported. Further, the denial of the

Petition For Rehearing of the Eleventh Circuit Court of Appeals of the United States, is attached hereto in the addendum.

STATEMENT OF JURISDICTION

After rendition of the decision by the Eleventh Circuit Court of Appeals on August 14, 1991, the Petitioners timely filed a Petition For Rehearing which was denied by the Eleventh Circuit Court of Appeals on September 27, 1991, Order Denying Petition For Reconsideration, Petitioners timely invoke the jurisdiction of this Court to review these decisions under Supreme Court Rule 10.1(a) in that the Eleventh Circuit Court of Appeals has rendered a decision in this case which is in conflict with the decisions of the Sixth Circuit Court of Appeals on the same matter, the Eleventh Circuit has now held that the palpation test alone, with no other objective symptoms is sufficient to

find a violation of the Horse Protection Act; and further under Supreme Court Rule 10.1(c) in that the Eleventh Circuit Court of Appeals has decided an important question of federal law, namely interpretation of the Horse Protection Act which has not been but should be settled by the United States Supreme Court; and finally under Supreme Court Rule 10.1(a) that the Eleventh Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's power of supervision, the USDA is selectively only enforcing a quasi-criminal law against Tennessee Walking Horse Trainers, Owners, Exhibitors for the last 20 years, and further the USDA is changing the plain meaning of the text of the Horse Protection Act without prior congressional approval.

CONSTITUTIONAL PROVISIONS AND OTHER STATUTES

See addendum for text of the Horse Protection Act.

STATEMENT OF THE CASE

A complaint was filed in the above captioned cause on the 3rd day of September, 1987 by the Administrator of the Animal and Plant Health Inspection Service of the United States Department of Agriculture ("Appellee" hereafter). The Appellee, in its complaint, alleged that on the 22nd day of May, 1986, the Respondents ("Appellants" hereinafter) entered for the purpose of showing or exhibiting the horse known as "Eb's Little Princess" in the Tennessee Walking Horse Spring Celebration Fun Show in Shelbyville, Tennessee while that horse was sore in violation of Section 5 (2)(b) of the Horse Protection Act. Complainant further alleged that on the 9th day

April, 1987, the Appellants entered for the purpose of showing or exhibiting the horse, "Great Big Country," in the Mississippi State Charity Horse Show in Jackson, Mississippi while that horse was sore in violation of Section 5 (b)(2) of the Horse Protection Act. The complainant sought the imposition of civil penalties against the Appellants in the form of fines and disqualifications.

An Oral hearing was conducted on the 16th and 17th days of August, 1988, in Montgomery, Alabama, before Administrative Law Judge, DOROTHEA A. BAKER. Upon considering the evidence presented at the Hearing, Judge Baker entered her Order and Decision on the 30th day of August, 1989. Judge Baker found that on the pertinent dates, the Appellants entered for the purpose of showing or exhibiting the horses known as "Eb's Little Princess" and "Great Big Country" while those horses were sore as defined in the Horse Protection Act. Judge

Baker disqualified both Appellants for two (2) years from showing, exhibiting, or entering, and from judging, managing, or otherwise participating in any horse show, and assessed civil penalties against each of the Appellants in the amount of TWO THOUSAND DOLLARS (\$2,000.00). See addendum for a copy of the Decision.

The Appellants, on or about the 3rd day of November, 1989, filed their Appeal to the Judicial Officer of Judge Baker's Order. The Appellants' Appeal was based on several enumerations of error and alleged that the Court erred in finding that, among other things, the horses, "Eb's Little Princess" and "Great Big Country," were sore as that term is defined in the Act and in imposing severe sanctions. Upon reviewing the Appellants' Appeal, Judicial Officer Campbell's Decision and Order of June 29, 1990 affirmed Judge Baker's Order. See addendum for a

copy of the Order. The Appellants' were served with Judicial Officer Campbell's Decision and Order on the 6th day of July, 1990 and filed their Petition For Reconsideration on the 16th day of July, 1990. On or about October 18, 1990 the Appellants filed a First Amendment to Brief in Support of Petition For Reconsideration.

In the First Amendment the Appellants argued that the Department of Agriculture should dismiss the case against the Appellants because the United States Attorney who prosecuted the Hearing against the Appellants had previously instructed both the government veterinarians and the designated qualified persons who examined the horses in question, and testified that "sore" and "sensitive" were the same according to the Department of Agriculture, and further instructed these people to fill out the 19-7 case form, and further examined and cross-examined these

people at the Appellants Hearing. Further, the Appellants argued that the USDA violated the Appellants Fifth, Sixth, and Fourteenth Amendment constitutional rights to a fair trial, and the right to confront and cross-examine witnesses, and equal protection of the law. Further, the Appellants argued that the palpation test alone is too arbitrary a test to show if a horse is sore. Finally, the Appellants argued that the palpation test as it is presently administered by the USDA is too arbitrary a test in that there is not the same uniform pressure applied by all government veterinarians, and designated qualified persons.

On or about December 14, 1991, Judicial Officer, DONALD A. CAMPBELL, denied the Appellants Petition For Reconsideration. The Judicial Officer stated that "Respondents' argument that they were denied a fair hearing, in violation of their constitutional

rights, came too late, and, in any event, is without merit." In many prior cases, the only evidence that a horse was sore was the professional opinion of the Department's veterinarians, based upon their palpation of the horse's pasterns.

Appellants requested "that any disqualification period applicable to them be effective as to each consecutively, so that one of them would be free to show horses at all times for the partnership, would render the disqualification sanction ineffective to serve as a deterrent to future violations by respondents and others..."

On or about January 10, 1991, the Appellants filed a Petition For Review with the United States Court of Appeals for the Eleventh Circuit. On or about August 14, 1991, after the Eleventh Circuit Court of Appeals heard oral argument on this case, the Eleventh Circuit Court of Appeals

affirmed the decision below. See addendum for a copy of the Decision. The Petitioners timely filed with the Eleventh Circuit Court of Appeals a Petition for Review. On or about September 27, 1991 the Eleventh Circuit Court of Appeals denied the Petitioners motion. See addendum for a copy of the denial. The Petitioners have timely filed this Petition For Writ of Certiorari with this Court.

SUMMARY OF ARGUMENT

The Petitioners are petitioning this Court writ of Certiorari of the Eleventh Circuit Court of Appeals decision to affirm the decision of the Administrative Law Judge in United States Department of Agriculture hearing whereby each of them was found to be in violation of the Horse Protection Act. The Petitioners have always maintained that there is no substantial evidence to show

that each of them was in violation of the Horse Protection Act.

First, the only evidence that the government veterinarians used to show that each horse was sore was the palpation test, whereby a government veterinarian applies pressure by finger application to various spots on both the horses front legs and/or feet, on to see if the horse moves in response to said application of pressure. It is the Petitioners position that this test alone is improper, arbitrary, and inaccurate to test if a horse is sore under the Horse Protection Act. There is no scientific study to show that a palpation test alone can determine if a horse is sore under the Horse Protection Act. For a horse to be considered sore under the Horse Protection Act, the horse has to be sore, or evidence bilateral abnormal sensitivity in both front limbs or hind limbs when it walks, trots, or otherwise is moving.

The Department of Agriculture was wrong when it initiated its policy to use the palpation test alone to determine if a horse was sore under the Horse Protection Act, as it did in the present case of the Appellants.

Further, the Department of Agriculture has put an enormous burden of responsibility on the part of the trainers and exhibitors of Tennessee Walking Horses. In the case of In re Jackie McConnell, Chester Gillespie, Sid Maddux, 44 Agric. Dec. 712, 722, the Court states:

"As the Judicial Officer has repeatedly stated, exhibitors of horses are absolute guarantors that their training methods and the action devices used during a show will not sore the horse. See Albert E. Rowland, 40 Agric. Dec. 1934, 1943 (1981), affd. 713 F2d 179 (6th Cir. 1983); and Richard L. Thornton, 41 Agric. Dec. 870, 887-888 (1982), affd. 715 Fwd, 508 (11th Cir. 1983). Both of these cases specifically held that the horses owner, nor its trainer will be exonerated under the Act because 'lawful' action devices were used."

The Petitioners are emphatic when they ask that if they are held to an absolute guarantee by the Department of Agriculture it is not asking too much for the Department of Agriculture to have several objective tests, WITH SCIENTIFIC DATA TO SUPPORT THE TESTS SELECTED, which are absolute tests to determine if a horse is sore. Obviously, a horse cannot talk so anyone applying a test to determine if a horse is sore must use his or her own subjective mental interpretation of the reaction of a horse to a particular test. Therefore, the fact that the Department of Agriculture has only interpreted the Horse Protection Act against the Tennessee Walking Horses and Racking Horses is very important to show bias on the part of the Department of Agriculture. This bias filters down to the government veterinarians and the designated qualified persons and arguably it affects negatively each of their

interpretations of the reaction of a horse to a palpation test.

Further, and more apparent proof of bias of the Department of Agriculture is its own arbitrary and unfounded changing of the wording of the Horse Protection Act when its attorney Donald Tracy stated in the Petitioners Hearing that it is the position of the Department of Agriculture in 1985, that "sensitive" equals "sore." The Petitioners did not get a fair hearing when the government attorney Donald Tracy then asked the same Government veterinarians and designated qualified persons that he instructed at a seminar in 1985, as set forth above, before the Hearing of Appellants, IF THE HORSES WERE SORE. It is quite obvious from the transcript of said Hearing, which is incorporated herein, that it is unclear if the witnesses meant "sensitive" or "sore."

This is a case of first impression. There is no Court of Appeals or United States Supreme Court case which has been decided to show that the results of a palpation test alone is sufficient to hold a trainer in violation of the Horse Protection Act. The Judicial Officer in his decision recites Agriculture Decisions but none of these relied on the palpation test alone. There were other observable objective symptoms.

The Petitioners filed a Petition For Rehearing after the decision of the Eleventh Circuit Court of Appeals affirmed the lower court decision because the Petitioners believe that this decision is directly in contrast to the previously decided cases of Thornton v. United States Department of Agriculture (11th Cir. 1983) 715 Fed. Rptr.2d 1508; and the following Sixth Circuit Court of Appeals case which was cited and approved in the aforementioned Eleventh

Circuit Court of Appeals case, namely,
Fleming v. United States Department of
Agriculture (6th Cir. 1983) 713 Fed.2d 179.

At the oral hearing, the Eleventh Circuit Judge asked the U.S. Attorney if there was any corroborating evidence, other than the palpation test, to show that the horses were sore in this case, and the U.S. Attorney said there was not.

The Eleventh Circuit Court of Appeals denied the Petition For Rehearing, so that the lack of uniformity in the law of these two Circuit Court of Appeals still persists.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Petitioners have been adjudicated as violating the Horse Protection Act according to the United States Department of Agriculture at an oral hearing as previously stated. But, the Petitioners believe that the United States Department of Agriculture through its

directives, Agriculture Decisions, policy and selective enforcement has so distorted the Horse Protection Act that it is now unconstitutional as applied. It is important to note here that the Petitioners and almost every Owner, Breeder, Exhibitor, and Trainer of Tennessee Walking Horses wants a Horse Protection Act. But, they want one that is enforced consistently and equally among all show horse breeds.

Petitioners contend that the United States Department of Agriculture has departed on its own from the clear letter of the law of the Horse Protection Act. Therefore, the Petitioners have provided the following pertinent sections of the Horse Protection Act which define a sore horse under the Horse Protection Act.

A. PERTINENT STATUTORY PROVISIONS

15 U.S.C. Section 1821 (3) provides
in part:

(3) The term sore when used to describe a horse means that...

(D) any... substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection use or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given. (emphasis added)

15 U.S.C. 1825(d)(5) states:

(5) In any civil or criminal action to enforce this Act or any regulation under this Act a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs. (emphasis added)

B. ARGUMENT

It is the Petitioners belief that a sensitive horse may not be a sore horse under the definitions provided in the Horse Protection Act. Under the Petitioners view a horse which does not show abnormal bilateral sensitivity in both forelimbs or back limbs when it walks, trots or otherwise is moving is not sore under the Horse Protection Act.

For a horse to be sore under the Horse Protection Act, the horse has to be sore when it walks, trots, or otherwise moves, and the soreness has to manifest itself as abnormal bilateral sensitivity in both of its forelimbs or hindlimbs.

1. THE PALPATION TEST ALONE IS
INSUFFICIENT TO DETERMINE
IF A HORSE IS SORE UNDER
THE HORSE PROTECTION ACT.
-

In both of these cases, the United States Department of Agriculture determined

that each of the horses was sore under the Horse Protection Act by the palpation test alone.

The palpation test is not listed as a test in the Horse Protection Act. This test was utilized by the United States Department of Agriculture on its own. It has always been the position of the Petitioners that the palpation test alone cannot determine soreness. There is no professional study done to show that the palpation test alone could determine whether or not a horse can be determined to be "sore" according to the Horse Protection Act. See the testimony of the noted veterinarian from Auburn, Dr. Ram C. Purohit (Rptr. Trans. p. 342-402). Dr. Purohit is one of the authors of the noted "Auburn Study." First, Dr. Purohit clearly states that "scientifically speaking, sensitivity, pain and soreness actually can be defined separately..." (Rptr. Trans. p. 348,

11. 9-10). Dr. Purohit goes on to state that "inflammation and soreness can be more closely defined and quantified than sensitivity and soreness..." (Rptr. Trans. p. 348, 11. 19-21).

Next, at the Oral Hearing, Appellant's attorney asked Dr. Purohit the following questions:

"Q. If you physically examine a horse's pastern area, if you palpate the pastern and in response to that palpation the horse jerks back its leg, is that proof in your mind that some substance or device has been used by a person on that limb?

A. I don't know...

Q. In your professional, expert opinion, does the fact that a horse jerks back its limb during physical palpation mean that that horse is experiencing pain?

A. He may do with or without pain. I mean, it depends on the animal, you know, varies and differs, that sometime even if you approach the animal close and if you are a strange person and know he can move..."

(Rptr. Trans. p. 365, 11. 2-21)

It is clear to the Petitioners that the palpation test alone is not a sufficient test to determine if a horse is sore under the Horse Protection Act.

At the time of these incidents, the United States Department of Agriculture had a memo on the palpation test, among other things. The name of said memo is United States Department of Agriculture Veterinary Services Memorandum No. 596.1 dated April 9, 1986. This memo was in effect at the time that both of the Appellants alleged violations occurred. Paragraph IV INSTRUCTIONS B. VMO'S 5. Physical Examination Guidelines explains the palpation test. This paragraph states:

"A uniform procedure should be used on each horse examined. Consistency with inspection procedures is important in gaining compliance or in case documentation to support the prosecution of the HPA.

A complete and thorough examination is recommended by picking up the

foot and observing the flexor or posterior surface. Then apply digital pressure on the 'pocket,' including the bulbs of the heel, and continue to observe the body responses throughout the examination. While continuing to hold onto the pastern, extend the foot and leg forward to examine the extensor surfaces including the coronary band.

A supplementary examination may be used by placing the horse's foot on the ground and palpating the same areas as mentioned above. A hand is placed on the horse's knee to help keep the foot on the ground. The opposite hand is then used to palpate the leg and pastern. Care should be taken to use total hand examination of the cannon bone and pastern. During the examination, be aware of tenderness, swelling, edema, or other evidence of inflammatory changes. Consistent hand pressure over the entire surface is recommended. It is important to apply finger or total hand pressure around the entire pastern including the 'pocket,' bulbs of the heel, and coronary band. Repeat the examination on the opposite leg.

A person standing in a postero-lateral position to the horse can be of great assistance in observing hand and body responses.

Several hand and body responses that may be observed are:

- a. Effort to move or shuffle the hind feet forward
- b. Pulling back or sagging on the hindquarters
- c. "Abdominal line" due to muscle contraction
- d. Pulling up or tightening of the gluteal muscles
- e. Holding the head down or to one side
- f. Eyes may have anxious expression

Any horse showing signs of bilateral soreness evidenced by repeated pain responses from the examination procedures should be considered sore and an alleged violation case written by completing a VS Form 19-7.

The aforementioned Memo is a diversion from the Horse Protection Act. The Act does not name a palpation test or any other test to determine if a horse is sore. The main provision of the Act states that the horse has to evidence bilateral abnormal sensitivity or inflammation when the horse walks, trots or otherwise is moving. The Petitioners' horses were determined to be sore when each of the horses was standing still,

not walking, trotting or otherwise moving. Further, the government veterinarians and the designated qualified persons did not have an objective procedure for the palpation test in this case. Each government veterinarian used different amounts of pressure in applying the palpation test to the horses in question. Dr. Tyler Riggins stated that he applied about "twenty to thirty percent of what I would normally press at the most I could press..." (Rptr. Trans. p. 56, ll. 15-19). Dr. Timothy Mandress testified that he applied about "fifteen to twenty percent of that..." (Rptr. Trans. p. 128, ll. 15-19).

It is quite obvious from the aforementioned testimony that the government veterinarians do not apply the same amount of pressure in performing the palpation test. How can the USDA expect Tennessee Walking Horse Trainers to guess the amount of pressure

to apply in preshow preinspection procedures to see if their horses will pass government palpation tests before they take their horses up to inspection? This is equivalent to playing Russian Roulette.

The government veterinarians if they find a violation of the Horse Protection Act fill out a VS Form 19-7 for each violation at the time that the violation occurred. This form shows quite clearly that the government veterinarians only applied the palpation test to show each of the horses in question was sore under the Horse Protection Act.

First, a horse is not sore under the Horse Protection Act if it exhibits sensitivity when it is standing alone, but does not exhibit abnormal bilateral sensitivity when it is walking, trotting or otherwise moving. Thus, it would seem obvious from the clear words of the Horse Protection Act,

that the government veterinarians would check the horse while it was walking, trotting or otherwise moving to see if the horse shows soreness. In this case, both horses appeared to move normally when coming to the inspection station, and when leaving the inspection station. These facts can be seen on the VS Form 19-7 that the government veterinarians are required to fill out. First, on the VS Form 19-7 for the Petitioner GARY R. EDWARDS, the government veterinarian wrote down the following:

on paragraph 29 way of going "lead normal;" on paragraph 30 general appearance, attitude, stance "during examination; stance was tucked; turned head to opposite side;" on paragraph 31 Respiration "Normal for a horse not worked;" on paragraph 32 Perspiration "Not perspiring;" on paragraph 33 Horse Sore Yes (If yes, explain) THERE IS NO EXPLANATION; on paragraph 34 Prohibited Substance THE ANSWER IS CHECKED NO. Therefore, without more, the government veterinarians did not determine properly that the horse "Great Big Country" was not sore under the Horse Protection

Act. Next, on the VS Form 19-7 for the Appellant LARRY E. EDWARDS on paragraph 29, way of going It is filled out NORMAL; on paragraph 30, general appearance, attitude & stance, It is filled out NORMAL; on paragraph 31 respiration, It is filled out NORMAL; on paragraph 32 perspiration, It is filled out NORMAL; on paragraph 33, is horse sore: Yes, If yes, explain; IT IS NOT FILLED OUT. Again, without more, it should be apparent that government veterinarians did not determine properly that the horse "Princess of Power" was sore according to the Horse Protection Act.

At the Petitioners Hearing, Petitioners counsel asked government veterinarian Dr. Glenn Jordan whether the horse Princess of Power showed signs of soreness, by attempting to move or shuffle its hind feet, by pulling back or sagging its hind quarters, by having an abdominal line due to muscle contraction, by pulling its gluteal muscles, by holding its head down or to one side, by having its eyes show an anxious expression, by having abnormal perspiration? Dr. Jordan answered NO TO EACH OF THESE QUESTIONS. (Rptr

Trans. pp. 115-119)

Next, at the Petitioners Hearing. Petitioners attorney asked Dr. Timothy Mandrell whether the horse Great Big Country showed signs of soreness, by attempting to move or shuffle its hind feet, by having an abdominal line due to muscle contraction, by pulling up its gluteal muscles, by having abnormal breathing, by having abnormal perspiration, by having an abnormal lead or way of going, by having any evidence of swelling in the pastern area, by having areas of scar tissue, by having any bleeding, by having any evidence of oozing serum, by having any abnormal calcium buildup, by having any evidence of inflammation of pastern area, by having any hair loss around the pastern area, by having any callouses around the pastern area, by having any granular tissue around the pastern area. Dr. Mandrell answered NO TO EACH OF THESE QUESTIONS. (Rptr. Trans. pp. 139-141)

In this case, both Petitioners horses moved normally when coming to the inspection station and when leaving the inspection station. The government veterinarians and the designated qualified persons relied solely on the palpation test. Both of the horses moved during the palpation tests, and the government veterinarians and the designated qualified persons concluded that the horses must have been sore. These officials did not test either of these horses when each of them were walking, trotting, or otherwise moving. These officials apparently forgot the Horse Protection Act, and relied solely upon the memorandum from the United States Department of Agriculture.

The Department of Agriculture in each of these cases relied solely on the palpation test to determine if each of the horses was sore under the Horse Protection Act. It is important to remark here that there is no

mention of the palpation test in the Horse Protection Act. The historians of the Tennessee Walking Horse Industry do not know when, or how the Department of Agriculture came to use the palpation test alone to check for soreness under the Act. In prior years, the tests included thermograms, along with observation, along with palpation test, along with watching the horses move, with action devices on, and then based upon the totality of the tests, the government veterinarians determined if the horse was sore under the Horse Protection Act. Twenty years ago when the Horse Protection Act first came into effect, a person could see open lesions, cuts, hair loss, scars on the Tennessee Walking Horses. But, that is past history. The DQP Program through the Tennessee Walking Horse Industry has cut out all these obvious signs of soreness years ago. Now, a person has to have a series of

objective tests to determine accurately if a horse is sore or evidences bilateral abnormal sensitivity when it walks, trots or otherwise moves to be classified as a sore horse under the Horse Protection Act.

This appears to be a case of first impression before United State Supreme Court, as Petitioners have not been able to locate any cite to the United States Supreme Court for the Horse Protection Act which has been in effect for over twenty (20) years. Further, there is not even one Court of Appeals case deciding the issues raised by the Petitioners. The Petitioners have not found one case from any United States Court of Appeal Circuit which had before it a case where the government veterinarians relied solely on the palpation test to determine that each of the horses was sore. Again, there have been several Agriculture Decisions whereby an Administrative Law Judge, and/or

the Judicial Officer has arbitrarily stated that the results of a palpation test alone was reliable enough to show that a horse was sore under the Horse Protection Act. See e.g. In re Purvis, 38 Agric. Dec. 1271, 1274-79 (1979); In re Whaley, 35 Agric. Dec. 1519, 1523 (1976); In re Gray, 41 Agric. Dec. 253, 254-255 (1982); In re Holcomb, 35 Agric. Dec. 1165, 1167 (1976).

The Petitioners believe that it is long overdue for the United States Department of Agriculture to have to prove to a Court of Law that there is a scientific reason that has been tested and proven to show the link between a horse moving on a stationary palpation test, and the conclusion that the horse is sore under the Horse Protection Act.

2. THE ARBITRARY INTERPRETATION BY THE UNITED STATES DEPARTMENT OF AGRICULTURE THAT A "SENSITIVE" HORSE IS A "SORE" HORSE UNDER THE HORSE PROTECTION ACT RENDERS THE ACT UNCONSTITUTIONAL AS APPLIED TO THE APPELLANTS.
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The United States Department of Agriculture has systematically applied its own meaning to the Horse Protection Act. Dr. Morley Cook headed the APHIS program during the period involved herein. Dr. Cook testified in the Hearing of In re: Pat Sparkman, Bill McCook, and Susan Jenkinson, HPA Docket No. 88-58 that it was the policy of the Department of Agriculture in 1985 and thereafter to almost exclusively check Tennessee Walking Horses and Racking Horses. (Rptr. Trans. pp. 166-168)

More disturbingly, the Department of Agriculture stated through its attorney Donald A. Tracy, in this Hearing for Appellants that the Department of Agriculture

believes that "sensitivity" and "soreness" are the same under the Horse Protection Act (Rptr. Trans. p. 324, ll. 20-24). THIS INTERPRETATION IS CATEGORICALLY WRONG UNDER THE HORSE PROTECTION ACT. THERE HAS TO BE ABNORMAL SENSITIVITY IN BOTH LIMBS for a horse to be sore, and further, the horse has to exhibit abnormal sensitivity when it walks, trots, or otherwise is moving. The Petitioners have looked extensively for legal precedent for this proposition that sensitivity equals sore and cannot find any. Obviously, this position of the Department of Agriculture would make the prosecution of government cases much easier if Courts would allow the Horse Protection Act to be, in effect, substantially altered by the application of another unfounded policy of the Department of Agriculture.

3. THE ACTIONS OF THE UNITED STATES DEPARTMENT OF AGRICULTURE IN HAVING ONE OF ITS UNITED STATES ATTORNEYS INSTRUCT THE GOVERNMENT VETERINARIANS AND THE DESIGNATED QUALIFIED PERSONS THAT A "SENSITIVE" HORSE IS A "SORE" HORSE UNDER THE HORSE PROTECTION ACT; AND THEN HAVING THE SAME UNITED STATES ATTORNEY PROSECUTE THE HEARING OF THE APPELLANTS; AND THEN HAVING THE SAME UNITED STATES ATTORNEY ASK THE GOVERNMENT VETERINARIANS AND DESIGNATED QUALIFIED PERSONS, THAT HE HAD PREVIOUSLY INSTRUCTED, IF THESE TWO HORSES WERE "SORE" WAS SO PREJUDICIAL AGAINST THE APPELLANTS AS TO VIOLATE THEIR CONSTITUTIONAL RIGHT TO DUE PROCESS.
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The bias on the part of the United States Department of Agriculture is shown during the Appellants Hearing before the Administrative Law Judge. Witness Jim Puckett was testifying as to the difference between sensitivity and soreness when a startling revelation occurred during the Hearing. Petitioners attorney was asking

Mr. Puckett if he was told by anyone in the USDA if you need more than just sensitivity from palpation because that's not a strong enough case to show a violation of the Horse Protection Act. Mr. Puckett stated that he heard about a two-day seminar addressing that particular issue (Rptr. Trans. p. 302, 11. 1-24). Mr. Puckett was asked who spoke at the seminar. Mr. Puckett responded that "Mr. Eades, Mr. Tracy" (Rptr. Trans. p. 303, 11. 2-5). Both the compliance officer and the Department of Agriculture prosecuting attorney in Appellants Hearing spoke at the seminar. YET, NEITHER MEN ASKED THE COURT TO BE RELIEVED FROM APPELLANTS HEARING. The Petitioners have no idea why the Petitioners' attorney did not ask for an immediate mistrial, and/or dismissal of all charges against the Petitioners. This action shows extreme bias and prejudice on the part of the Department of Agriculture.

Department of Agriculture Attorney
Donald A. Tracy then asked Mr. Puckett if he has ever seen any bias displayed by any of the government veterinarians toward trainers, owners or others in the horse industry and Mr. Puckett answered no. (Rptr. Trans. p. 316, ll. 18-21). This action of the Department of Agriculture attorney, who both spoke at the seminar, instructed the participants on how to fill out the forms, and the definition of "sore" equals "sensitive" is a futile attempt on the part of the Department of Agriculture attorney to camouflage the bias existing in the United States Department of Agriculture against the Appellants and the Tennessee Walking Horse Trainers in general.

The issue of sensitivity equalling soreness is very important when, as in this case, the Department of Agriculture relied entirely on palpation tests to determine

that each of the two horses of the Petitioners were sore. Further, if the government veterinarians and the designated qualified persons were told at a seminar that sensitive horses are sore horses, then HOW CAN A RATIONAL HUMAN BEING BELIEVE THAT WHEN THESE SAME GOVERNMENT VETERINARIANS AND DESIGNATED QUALIFIED PERSONS ARE QUESTIONED IN APPELLANTS HEARING BY THE SAME GOVERNMENT ATTORNEY WHO SPOKE AT THE SEMINAR AND TOLD THEM THAT SENSITIVITY EQUALLED SORENESS, IN ALL CASES, WOULD TESTIFY ANY OTHER WAY? This is another example in the transcribed record of bias and prejudice on the part of the Department of Agriculture against the Petitioners and/or the Tennessee Walking Horse Industry.

The Petitioners Hearing got worse. Mr. Puckett later testified that "I do remember saying that you didn't want to hear the term sensitive anymore" (Rptr. Trans.

p. 325, ll. 1-3). Department of Agriculture attorney Donald A. Tracy then stated "Because I had said sore and sensitive meant the same thing to USDA?" (Rptr. Trans. p. 325, ll. 7-8). Here the prosecuting attorney is testifying without ever being placed under oath. The Petitioners do not know why their attorney did not object at this point. Then Mr. Puckett made the following highly damaging statement against the USDA "... you were adamant in that you wanted it put sore and not sensitive on that report form, because a lot of them had been filled out with the word sensitive, and it got into problems with degree of sensitivity and that type things and as defined by the Horse Protection Act and also in the amended regulations it refers to the term as sore..." (Rptr. Trans. p. 325, ll. 12-18). This testimony is mind boggling, and clearly shows the prejudice and bias of the USDA and the

resulting bias of the government veterinarians and the designated qualified persons who attended the seminar and then testified at Appellants Hearing. IT GOT WORSE.

Next, Department of Agriculture Attorney Donald A. Tracy asked: "Would you dispute it if I told you that what I said in addition to that, the explanation of that, was that was because sensitive is sore and meant the same thing?" (Rptr. Trans. p. 325, ll. 19-22). Mr. Puckett answered: "Well, if it meant the same thing, I don't know why you would have changed the terminology." (Rptr. Trans. p. 325, ll. 23-24). Here again there is testimony by Department of Agriculture Attorney Donald A. Tracy without his being placed under oath. Further, it is quite clear from the testimony of Designated Qualified Person Mr. Puckett that the USDA has created a great deal of confusion as to whether or not a sensitive horse is a sore horse. Therefore,

when the attorney for Petitioners at the Hearing was asking questions from the government veterinarians and the designated qualified persons about whether the horses were sore or not, it is not clear from the record if these people were talking about a sensitive horse or a sore horse, and/or whether the sensitive horse was sore under the Horse Protection Act.

THE AFOREMENTIONED CONFUSION HAS SURELY DENIED THE APPELLANTS A FAIR HEARING WHEN THE GOVERNMENT VETERINARIANS AND THE DESIGNATED QUALIFIED PERSONS SOLELY RELIED UPON THE PALPATION TESTS ALONE AND THUS THEIR SUBJECTIVE INTERPRETATIONS WERE POISONED BY THE NOTION THAT A SENSITIVE REACTION IS A SORE REACTION ON THE PART OF THE HORSE.

Next, Department of Agriculture attorney Donald A. Tracy states to the Administrative Judge that

"The Department veterinarians as evidence by their testimony when

they find a horse sore are stating that the horse is sore. They believe, as Dr. Riggins will testify, as I said yesterday, in rebuttal that when he uses and other Department veterinarians use the term sensitive they are using it the same as sore. The Department concedes that other people outside the Department use the term sensitive in any variety of ways...But the Department-when a Department veterinarian if he is using the word sore and if he uses the word sensitive, he is meaning it the same as sore, sensitive to pain." (Rptr. Trans. p. 336, ll. 5-21).

It is respectfully submitted by the Petitioners that the USDA is exceeding its authority and cannot unilaterally change the terms of the Horse Protection Act. This is another action on the part of the USDA to take a constitutional act and make it unconstitutional by its unfounded and prejudicial actions in changing the clear meaning of the words in the Horse Protection Act. The USDA knows that most Tennessee Walking Horse trainers do not have the money or the knowledge to fight an expensive battle

in a Court of Appeals, and the United States Supreme Court to overturn the actions of the USDA.

Further, the Petitioners believe that they were denied their constitutional right pursuant to the Sixth Amendment to the U.S. Constitution to confront and cross-examine all witnesses against them. The Appellants Hearing was quasi-criminal in nature, and the Appellants were denied the right to examine the Department of Agriculture attorney Donald A. Tracy. The right to cross-examine witnesses in quasi-judicial proceedings is a right of fundamental importance. Greene v. McElroy, 360 U.S. 474. Further, the court in Reily v. Pinkus, 338 U.S. 269 states how important the right to cross-examination is and how violation of this right is not merely harmless error.

4. THE SELECTIVE ENFORCEMENT OF THE HORSE PROTECTION ACT BY THE DEPARTMENT OF AGRICULTURE AGAINST THE APPELLANTS AND OTHER TRAINERS, OWNERS, BREEDERS, AND EXHIBITORS OF THE TENNESSEE WALKING HORSE BREED VIOLATES THE FIFTH, FOURTEENTH, AND SIXTH AMENDMENT CONSTITUTIONAL RIGHTS OF THE APPELLANTS SO AS TO RENDER THE HORSE PROTECTION ACT UNCONSTITUTIONAL.
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The Horse Protection Act is quasi-criminal in nature, and the violators of this Act can be suspended from the Industry for up to two years on a first time violation, and given a substantial fine to boot. There is also a criminal law aspect to a portion of this Act where a violator can be incarcerated. Therefore, this Act should be applied fairly against all Owners, Breeders, Exhibitors, and Trainers of all horses.

But, the Respondent, and its government veterinarians have systematically only inspected Tennessee Walking Horses in 1985,

1986, 1987, 1988, 1989, 1990. The government veterinarians did not inspect any other show horses during the aforementioned years with any regularity at all. See copy of transcript of testimony of Dr. Morley Cook, Rptr. Trans 167, ll. 9-16, who was the Head of APHIS during the period of this case, recorded in the Hearing of: In re Sparkman, Bill McCook, and Susan Jenkinson, HPA Docket No. 88-58, Testimony taken on March 14, 1990 at Los Angeles, CA. Appellants would like this Court to take judicial notice of the relevant transcript provisions. In the Sparkman Hearing, Dr. Morley Cook testified the following:

"Q. Were you the head of the Horse Protection in 1985?

A. Beginning in May of '85.

Q. Did you set up the policy that the Horse Protection Act was only going to be interpreted by APHIS against Tennessee walking horses in 1985?

A. That I was singling out the Tennessee walking horse?

Q. Yes.

A. No, I did not.

Q. In effect, didn't you have a policy in 1985 that the government veterinarians at a horse show would only check Tennessee walking horses?

A. Not exactly, because the Act covers all breeds of horses.

Q. Right.

A. However, resources limited us to mostly Tennessee walker and racking horses.

Q. Okay, instead of saying mostly, isn't almost always the fact that it was just Tennessee walking horses and racking horses, that your policy was created in 1985 to only inspect those horses and not other show horses at multi-show -- multi breed shows like Montgomery in 1985 and Baton Rouge in 1985?

A. I couldn't specifically say on those two particular shows. As I say, there were exceptions but most of our inspections did dwell on the Tennessee walking horses or racking horses...

Q. Okay, in 1985 you said you went to about twenty horse shows and observed -- twenty to twenty-five horse shows and observed your government vets inspecting horses, right? How many of those horses at the twenty to twenty-five shows in 1985 were other than Tennessee walking horses and racking horses?

A. Very minimal.

Q. Very minimal meaning zero, right?

A. No, I think there was exceptions to that.

Q. Okay, how many exceptions?

A. I really can't recall, but I will say a very minimal."

(In re Pat Sparkman Rptr. Trans.
p. 166-168)

It is quite clear to the Petitioners that the aforementioned testimony of Dr. Morley Cook, who headed APHIS during the period of the Appellants alleged violations of the Horse Protection Act, and further by the Department of Agriculture's failure from 1985 and thereafter to check any other horse than Tennessee Walking Horses and Racking Horses at all breed shows is a denial of equal protection of the law for Tennessee Walking Horse and Racking Horse Trainers, Breeders, Exhibitors and Owners, and more particularly the Appellants in this case.

Petitioners believe that the Tennessee Walking Horse has become over the years a symbol of the "South." The Tennessee Walking Horse was developed in the South, namely, Tennessee, and the breed continues to use its name "Tennessee" Walking Horse. The success and popularity of the Horse is primarily in the South of the United States. Further, at least 82% of the Tennessee Walking Horse Trainers are from the 13 southern states of the United States. Further, at least 42% of the trainers are from the state of Tennessee. Currently, at all breed shows such as Montgomery, Alabama, and Baton Rouge, Louisiana, the USDA is still only checking Tennessee Walking Horses, and no other breeds. The Petitioner believes that this is a clear cut case of de facto discrimination against Southern citizens who happen to be Tennessee Walking Horse Trainers, Breeders, Exhibitors or Owners.

After twenty (20) years of the Horse Protection Act, the Tennessee Walking Horse is the only show horse organization that has a Designated Qualified Person Program ("DQP Program" hereafter). No other show horse organization in 20 years of the Act, and under the purview of Respondent has developed a DQP Program. This fact alone further illustrates the constant discrimination placed on the Tennessee Walking Horse Industry by the Respondent, and for over twenty years.

The DQP Program by its self inspection of Tennessee Walking Horses has virtually eliminated the sore horse where there are visual signs to the naked eye such as signs of open sores, hair loss, or obvious limping. Now, DQPs and government veterinarians cannot tell by just looking whether a horse is sore or not.

5. THE SANCTIONS OF TWO YEARS SUSPENSION AGAINST EACH OF THE APPELLANTS SIMULTANEOUSLY FOR FIRST TIME OFFENDERS IS TOO HARSH AND DISCRIMINATORY PENALTY WHEN THE APPELLANTS HAVE NO OTHER SOURCE OF INCOME THAN TO BE TENNESSEE WALKING HORSE TRAINERS, AND FURTHER WHEN THE NORMAL PERIOD OF DISQUALIFICATION FOR FIRST TIME OFFENDERS BY THE USDA IS ONE YEAR.
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Petitioners believe that the sanctions imposed against them is too severe in light of the facts and the criteria for civil penalties as stated in 15 U.S.C. Sec. 1825(c).

The Secretary, in addition to any other sanctions, may disqualify any person convicted under the Act from "... showing or exhibiting any horse, judging or managing any horse show, or horse exhibition, or horse sale or auction, for a period of not less than one (1) year for the first violation..." 15 U.S.C. Sec. 1825(c). The factors relevant to the assessment of a civil penalty found

in 15 U.S.C. Sec. 1825(b)(1) are incorporated as a part of 15 U.S.C. Sec. 1825(c) and apply the imposition of a disqualification. To determine the period of disqualification:

"... the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require."

15 U.S.C. Sec. 1825(b)(1).

Each of the Petitioners was involved with the training and exhibiting of one horse. The Department of Agriculture is trying to tag two violations against each of the Appellants. This action of the Respondent is obvious as the Respondent did not bring this action against the Petitioners individually, and d/b/a Carl Edwards and Son Stables. It is Petitioners position now that it was improper and a violation of the

due process rights for the Department of Agriculture to bring this against the partnership, and not the Petitioners individually and d/b/a. This fact is very apparent when the Form VS 19-7s under the Trainers name on paragraph 14 for each of the Appellants violations it states the individual trainers name.

CONCLUSION

It is respectfully submitted that the United States Supreme Court grant Petitioners Petition For Writ of Certiorari to Eleventh Circuit, United States Court of Appeals, intercede here and dismiss the charges against the Petitioners for the aforementioned reasons, and or in the alternative for a new trial.

This case before the Administrative Law Judge has violated the Appellants Fifth, Sixth, and Fourteenth Amendment Constitutional rights, and have denied them due process

under the law, and a right to a fair hearing. Further, there is substantial evidence presented by the Petitioners that the Department of Agriculture denied them due process under the law. The testimony of the government veterinarians was so tainted by the instructions given to them at the seminar about "sensitive" equals "sore" by the prosecuting attorney that the Petitioners were denied their right to due process of law.

Next, the selective discrimination by the United States Department of Agriculture in the unequal enforcement of the Horse Protection Act against Owners, Breeders, Exhibitors and Trainers of Tennessee Walking Horses for over 20 years is a denial of equal protection of the law and has rendered the Horse Protection Act as unconstitutional as applied by the United States Department of Agriculture.

Finally, the imposition of a two (2) year suspension for each Appellant for the first time violation of the Horse Protection Act is too severe and should not be imposed, as it is a substantial and severe penalty, taking away from both Petitioners each of their sole source of income for two years.

Respectfully submitted,

PAUL D. PRIAMOS
Attorney for Petitioners

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APPENDIX A



HORSE PROTECTION ACT

Title 15 U.S.C. §§ 1821 et seq

§1821. Definitions

As used in this chapter unless the context otherwise requires:

(1) The term "management" means any person who organizes, exercises control over, or administers or who is responsible for organizing, directing, or administering.

(2) The term "Secretary" means the Secretary of Agriculture.

(3) The term "sore" when used to describe a horse means that--

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into

or used by a person on any limb of a horse,
or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

(4) The term "State" means any of the several States, the District of Columbia,

the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

(Pub. L. 91-540, § 2, Dec. 9, 1970, 84 Stat. 1404; Pub. L. 94-360, § 3, July 13, 1976, 90 Stat. 915.)

AMENDMENTS

1976--Pub. L. 94-360 added pars. (1) and (2), redesignated subsec. (a), defining "sore" as meaning that certain substances or devices had been applied to any limb of a horse prior to Dec. 9, 1970, resulting in, or reasonably likely to result in, such horse suffering physical pain or distress when walking or trotting, as par. (3) and, as so redesignated, struck out requirement that such substance or device had to have been applied prior to Dec. 9, 1970 in order for a horse to be considered "sored" for purposes of this chapter, and substituted par. (4) defining "State" for subsec. (b) defining "commerce"

as between a point in any State or possession of the United States and any point outside thereof, or between points within the same State or possession of the United States but through any place outside thereof or within the District of Columbia, or from any foreign country to any point within the United States.

SHORT TITLE OF 1976 AMENDMENT

Section 1(a) of Pub. L. 94-360 provided that: "'This Act [amending sections 1821 to 1825, 1827, 1830 and 1831 of this title, and enacting provisions set out as notes under sections 1821 and 1831 of this title] may be cited as the 'Horse Protection Act Amendments of 1976'."

SHORT TITLE

Section 1 of Pub. L. 91-540, as amended by Pub. L. 94-360, § 2, July 13, 1976, 90 Stat. 915, provided: "'That this Act

[enacting this chapter] may be cited as the
'Horse Protection Act'.'

§ 1822. Congressional statement of findings

The Congress finds and declares that--

(1) the soring of horses is cruel and
inhumane;

(2) horses shown or exhibited which
are sore, where such soreness improves the
performance of such horse, compete unfairly
with horses which are not sore;

(3) the movement, showing, exhibition,
or sale of sore horses in intrastate commerce
adversely affects and burdens interstate and
foreign commerce;

(4) all horses which are subject to
regulation under this chapter are either in
interstate or foreign commerce or substanti-
ally affect such commerce; and

(5) regulation under this chapter by
the Secretary is appropriate to prevent and
eliminate burdens upon commerce and to

effectively regulate commerce.

(Pub. L. 91-540, § 3, Dec. 9, 1970, 84 Stat. 1405; Pub. L. 94-360, § 4, July 13, 1976, 90 Stat. 915.)

AMENDMENTS

1976--Pub. L. 94-360, among other changes added findings stating that all horses subject to regulation under this chapter are either in interstate or foreign commerce or substantially affect interstate or foreign commerce, and that regulation by the Secretary is appropriate to eliminate burdens upon commerce.

§ 1823. Horse Shows and exhibitions

(a) Disqualification of horses

The management of any horse show or horse exhibition shall disqualify any horse from being shown or exhibited (1) which is sore or (2) if the management has been notified by a person appointed in accordance with

regulations under subsection (c) of this section or by the Secretary that the horse is sore.

(b) Prohibited activities

The management of any horse sale or auction shall prohibit the sale or auction or exhibition for the purpose of sale of any horse (1) which is sore or (2) if the management has been notified by a person appointed in accordance with regulations under subsection (c) of this section or by the Secretary that the horse is sore.

(c) Appointment of inspectors; manner of inspections

The Secretary shall prescribe by regulation requirements for the appointment by the management of any horse show, horse exhibition, or horse sale or auction of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcing this chapter.

Such requirements shall prohibit the appointment of persons who, after notice and opportunity for a hearing, have been disqualified by the Secretary to make such detection, diagnosis, or inspection. Appointment of a person in accordance with the requirements prescribed under this subsection shall not be construed as authorizing such person to conduct inspections in a manner other than that prescribed for inspections by the Secretary (or the Secretary's representative) under subsection (e) of this section.

(d) Recordkeeping and reporting requirements;
availability of records

The management of a horse show, horse exhibition, or horse sale or auction shall establish and maintain such records, make such reports, and provide such information as the Secretary may by regulation reasonably require for the purposes of implementing this chapter or to determine compliance with

this chapter. Upon request of an officer or employee duly designated by the Secretary, such management shall permit entry at all reasonable times for the inspection and copying (on or off the premises) of records required to be maintained under this subsection.

(e) Inspection by Secretary or duly appointed representative

For purposes of enforcement of this chapter (including any regulation promulgated under this chapter) the Secretary, or any representative of the Secretary duly designated by the Secretary, may inspect any horse show, horse exhibition, or horse sale or auction or any horse at any such show, exhibition, sale, or auction. Such an inspection may only be made upon presenting appropriate credentials. Each such inspection shall be commenced and completed with reasonable limits and in a reasonable manner. An

inspection under this subsection shall extend to all things (including records) bearing on whether the requirements of this chapter have been complied with.

(Pub. L. 91-540, § 4, Dec. 9, 1970, 84 Stat. 1405; Pub. L. 94-360, § 5, July 13, 1976, 90 Stat. 916.)

AMENDMENTS

1976--Pub. L. 94-360 substituted provisions relating to the inspection and disqualification of horses participating in horse shows and exhibitions, the issuance of regulations by the Secretary, and the maintenance of records by horse show management, for provisions prohibiting as constituting unlawful acts the exhibition of sore horses, the transportation in commerce for purposes of exhibition or any horse that had been sore, and the conduction of any show or exhibition in which sore horses appear. Provisions now covering such unlawful acts

d
are set out as section 1824 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1824, 1825 of this title.

§ 1824. Unlawful acts

The following conduct is prohibited:

(1) The shipping, transporting, moving, delivering, or receiving of any horse which is sore with reason to believe that such horse while it is sore may be shown, exhibited, entered for the purpose of being shown or exhibited, sold, auctioned, or offered for sale, in any horse show, horse exhibition, or horse sale or auction; except that this paragraph does not apply to the shipping, transporting, moving, delivering, or receiving of any horse by a common or contract carrier or an employee thereof in the usual course of the carrier's business or employee's employment unless the carrier

or employee has reason to believe that such horse is sore.

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

(3) The failure by the management of any horse show or horse exhibition, which does not appoint and retain a person in accordance with section 1823(c) of this title, to disqualify from being shown or exhibited any horse which is sore.

(4) The failure by the management of any horse sale or auction, which does not

appoint and retain a qualified person in accordance with section 1823(c) of this title, to prohibit the sale, offering for sale, or auction of any horse which is sore.

(5) The failure by the management of any horse show or horse exhibition, which has appointed and retained a person in accordance with section 1823(c) of this title, to disqualify from being shown or exhibited any horse (A) which is sore, and (B) after having been notified by such person or the Secretary that the horse is sore or after otherwise having knowledge that the horse is sore.

(6) The failure by the management of any horse sale or auction which has appointed and retained a person in accordance with section 1823(c) of this title, to prohibit the sale, offering for sale, or auction of any horse (A) which is sore, and (B) after having been notified by such person or the

Secretary or after otherwise having knowledge that the horse is sore.

(7) The showing or exhibiting at a horse show or horse exhibition; the selling or auctioning at a horse sale or auction; the allowing to be shown, exhibited, or sold at a horse show, horse exhibition, or horse sale or auction; the entering for the purpose of showing or exhibiting in any horse show or horse exhibition; or offering for sale at a horse sale or auction, any horse which is wearing or bearing any equipment, device, paraphernalia, or substance which the Secretary by regulation under section 1828 of this title prohibits to prevent the soring of horses.

(8) The failing to establish, maintain, or submit records, notices, reports, or other information required under section 1823 of this title.

ge (9) The failure or refusal to permit access to or copying of records, or the failure or refusal to permit entry or inspection, as required by section 1823 of this title.

d (10) The removal of any marking required by the Secretary to identify a horse as being detained.

(11) The failure or refusal to provide the Secretary with adequate space or facilities, as the Secretary may by regulation under section 1828 of this title prescribe, in which to conduct inspections or any other activity authorized to be performed by the Secretary under this chapter.

(Pub. L. 91-450, § 5, Dec. 9, 1970, 84 Stat. 1405; Pub. L. 94-360, § 6, July 13, 1976, 90 Stat. 916.)

AMENDMENTS

1976--Pub. L. 94-360 substituted provisions prohibiting the transportation, receipt,

exhibition, sale, or auction of a sored horse, and the showing, sale or auction of a horse bearing any device or substance prohibited by regulation of the Secretary, and making the management of a horse show, exhibition, or sale, responsible for failure to disqualify such horses from participating and for interfering with the conducting of inspections by the Secretary of horses in the show or of the management records, for provisions authorizing the inspection of horses, transported in commerce, and requiring the management of shows and exhibitions to maintain such records as the Secretary prescribes. Provisions now covering the maintenance of records and the inspection of horses are set out as section 1823 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1825, 1827 of this title.

§ 1825. Violations and penalties

(a) Criminal acts and penalties

(1) Except as provided in paragraph (2) of this subsection, any person who knowingly violates section 1824 of this title shall, upon conviction thereof, be fined not more than \$3,000 or imprisoned for not more than one year, or both.

(2)(A) If any person knowingly violates section 1824 of this title, after one or more prior convictions of such person for such a violation have become final, such person shall, upon conviction thereof, be fined not more than \$5,000, or imprisoned for not more than two years, or both.

(B) Any person who knowingly makes, or causes to be made, a false entry or statement in any report required under this chapter, who knowingly makes, or causes to be made, any false entry in any account, record, or memorandum required to be established and

maintained by any person or in any notification or other information required to be submitted to the Secretary under section 1823 of this title; who knowingly neglects or fails to make or cause to be made, full, true, and correct entries in such accounts, records, memoranda, notification, or other materials; who knowingly removes any such documentary evidence out of the jurisdiction of the United States; who knowingly mutilates, alters, or by any other means falsifies any such documentary evidence; or who knowingly refuses to submit any such documentary evidence to the Secretary for inspection and copying shall be guilty of an offense against the United States, and upon conviction thereof shall be fined not more than \$5,000, or imprisoned for not more than three years, or both.

(C) Any person who forcibly assaults, resists, opposes, impedes, intimidates, or

interferes with any person while engaged in or on account of the performance of his official duties under this chapter shall be fined not more than \$5,000, or imprisoned not more than three years, or both. Whoever, in the commission of such acts, uses a deadly or dangerous weapon shall be fined not more than \$10,000, or imprisoned not more than ten years, or both. Whoever kills any person while engaged in or on account of the performance of his official duties under this chapter shall be punishable as provided under sections 1111 and 1112 of title 18.

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than \$2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such

violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing

notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.

(3) If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order, or after the appropriate court of appeals has entered final judgment in favor of the Secretary, the Secretary shall refer the matter to the Attorney General, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and

appropriateness of the final order imposing the civil penalty shall not be subject to review.

(4) The Secretary may, in his discretion, compromise, modify, or remit, with or without conditions, any civil penalty assessed under this subsection.

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity

for a hearing before the Secretary, or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than \$3,000 for each violation. Any horse show, horse exhibition, or horse sale or auction, or the management thereof, collectively and severally, which knowingly allows any person who is under an order of disqualification to show or exhibit any horse, to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition, or horse sale or auction in violation of an order shall be subject to a civil penalty of not more than \$3,000 for each violation.

The provisions of subsection (b) of this Section respecting the assessment, review, collection, and compromise, modification, and remission of a civil penalty apply with respect to civil penalties under this subsection.

(d) Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction

(1) The Secretary may require by subpoena the attendance and testimony of witnesses and the production of books, papers, and documents relating to any matter under investigation or the subject of a proceeding. Witnesses summoned before the Secretary shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(2) The attendance of witnesses, and the production of books, papers, and documents, may be required at any designated place from

any place in the United States. In case of disobedience to a subpoena the Secretary, or any party to a proceeding before the Secretary, may invoke the aid of any appropriate district court of the United States in requiring attendance and testimony of witnesses and the production of such books, papers, and documents under the provisions of this chapter.

(3) The Secretary may order testimony to be taken by deposition under oath in any proceeding or investigation pending before him, at any stage of the proceeding or investigation. Depositions may be taken before any person designated by the Secretary who has power to administer oaths. The Secretary may also require the production of books, papers, and documents at the taking of depositions.

(4) Witnesses whose depositions are taken and the persons taking them shall be entitled

to the same fees as paid for like services in the courts of the United States or in other jurisdictions in which they may appear.

(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

(6) The United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the highest court of American Samoa, and the United States courts of the other territories, are vested with jurisdiction specifically to enforce, and to prevent and restrain violations of this chapter, and shall have jurisdiction in all other kinds of cases arising under this chapter, except as provided in subsection (b) of this section.

(e) Detention of horses; seizure and condemn
condemnation of equipment

(1) The Secretary may detain (for a period not to exceed twenty-four hours) for examination, testing, or the taking of evidence, any horse at any horse show, horse exhibition, or horse sale or auction which is sore or which the Secretary has probable cause to believe is sore. The Secretary may require the temporary marking of any horse during the period of its detention for the purpose of identifying the horse as detained. A horse which is detained subject to this paragraph shall not be moved by any person from the place it is so detained except as authorized by the Secretary or until the expiration of the detention period applicable to the horse.

(2) Any equipment, device, paraphernalia, or substance which was used in violation of any provision of this chapter or any

regulation issued under this chapter or which contributed to the soring of any horse at or prior to any horse show, horse exhibition, or horse sale or auction, shall be liable to be proceeded against, by process of libel for the seizure and condemnation of such equipment, device, paraphernalia, or substance, in any United States district court within the jurisdiction of which such equipment, device, paraphernalia, or substance is found. Such proceedings shall conform as nearly as possible to proceedings in rem in admiralty.

(Pub. L. 91-450, § 6, Dec. 9, 1970, 84 Stat. 1406; Pub. L. 94-360, § 7, July 13, 1976, 90 Stat. 918.)

AMENDMENTS

1976--Subsec. (a). Pub. L. 94-360 substituted provisions increasing the maximum amount of fine that can be imposed and the maximum length of imprisonment that can be

ordered for knowingly performing enumerated activities prohibited under this chapter, for provisions authorizing a maximum civil penalty of \$1,000 for each unintentional violation of this chapter, requiring notice to an alleged violator prior to assessment of any penalty and authorizing the institution of civil actions by the Attorney General to enforce such penalties.

Subsec. (b). Pub. L. 94-360 substituted provisions relating to imposition of civil penalties up to \$2,000, criteria for imposition of particular amounts, and procedures for review and enforcement of civil penalties, for provisions authorizing fines up to \$2,000 and/or imprisonment up to six months for intentional violations of provisions of this chapter or any regulation issued thereunder.

Subsecs. (c) to (e). Pub. L. 94-360 added subsecs. (c) to (e).

FEDERAL RULES OF CIVIL PROCEDURE

Admiralty and maritime rules of practice (which included libel procedures) were superseded, and civil and admiralty procedures in United States district courts were unified, effective July 1, 1966, see rule 1 and Supplemental Rules for Certain Admiralty and Maritime Claims, Title 28, Appendix, Judiciary and Judicial Procedure.

§ 1826. Notice of violations to Attorney General

Whenever the Secretary believes that a willful violation of this chapter has occurred and that prosecution is needed to obtain compliance with this chapter, he shall inform the Attorney General and the Attorney General shall take such action with respect to such matter as he deems appropriate.

(Pub. L. 91-540, § 7, Dec. 9, 1970, 84 Stat. 1406.)

§ 1827. Utilization of personnel of Department of Agriculture and officers and employees of consenting States; technical and other nonfinancial assistance to State

(a) Assistance from Department of Agriculture and States

The Secretary, in carrying out the provisions of this chapter, shall utilize, to the maximum extent practicable, the existing personnel and facilities of the Department of Agriculture. The Secretary is further authorized to utilize the officers and employees of any State, with its consent, and with or without reimbursement, to assist him in carrying out the provisions of this chapter.

(b) Assistance to States

The Secretary may, upon request, provide technical and other nonfinancial assistance (including the lending of equipment on such

terms and conditions as the Secretary determines is appropriate) to any State to assist it in administering and enforcing any law of such State designed to prohibit conduct described in section 1824 of this title. (Pub. L. 91-540, § 8, Dec. 9, 1970, 84 Stat. 1406; Pub. L. 94-360, § 8, July 13, 1976, 90 Stat. 920.)

AMENDMENTS

1976--Pub. L. 94-360 designated existing provisions as subsec. (a) and added sub subsec. (b).

§ 1828. Rules and regulations

The Secretary is authorized to issue such rules and regulations as he deems necessary to carry out the provisions of this chapter. (Pub. L. 91-540, § 9, Dec. 9, 1970, 84 Stat. 1406.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1824 of this title.

§ 1829. Preemption of State laws; concurrent jurisdiction; prohibition on certain State action

No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together. Nor shall any provision of this chapter be construed to exclude the Federal Government from enforcing the provision of this chapter within any State, whether or not such State has enacted legislation on the same subject, it being the intent of the Congress to establish

concurrent jurisdiction with the States over such subject matter. In no case shall any such State take any action pursuant to this section involving a violation of any such law of that State which would preclude the United States from enforcing the provisions of this chapter against any person.

(Pub. L. 91-540, § 10, Dec. 9, 1970, 84 Stat. 1406.)

§ 1830. Report to the Congress

On or before the expiration of thirty calendar months following December 9, 1970, and every twelve calendar months thereafter, the Secretary shall submit to the Congress a report upon the matters covered by this chapter, including enforcement and other actions taken thereunder, together with such recommendations for legislative and other action as he deems appropriate.

(Pub. L. 91-540, § 11, Dec. 9, 1970, 84 Stat. 1406; Pub. L. 94-360, § 9, July 13, 1976,

90 Stat. 920.)

AMENDMENTS

1976--Pub. L. 94-360 substituted "twelve calendar months" for "twenty-four calendar-month period."

§ 1831. Authorization of appropriations

There are authorized to be appropriated to carry out this chapter \$125,000 for the period beginning July 1, 1976, and ending September 30, 1976; and for the fiscal year beginning October 1, 1976, and for each fiscal year thereafter there are authorized to be appropriated such sums, not to exceed \$500,000, as may be necessary to carry out this chapter.

(Pub. L. 91-540, § 12, Dece. 9, 1970, 84 Stat. 1407; Pub. L. 94-360, § 10, July 13, 1976, 90 Stat. 921.)

AMENDMENTS

1976--Pub. L. 94-360 substituted provisions authorized \$125,000 to be appropriated for the period beginning July 1, 1976 and ending September 30, 1976, and \$500,000 to be appropriated for the fiscal year beginning October 1, 1976, and each fiscal year thereafter, to carry out the purposes of this chapter. for provisions authorizing not more than \$100,000 to be appropriated annually to carry out the provisions of this chapter.

EFFECTIVE DATE OF 1976 AMENDMENT

Section 10 of Publ L. 94-360 provided in part that the amendment by Pub. L. 94-360 is effective July 1, 1976.

APPENDIX B



THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8038

LARRY E. EDWARDS and FILED
GARY R. EDWARDS d/b/a U.S. COURT OF APPEALS
CARL EDWARDS AND SONS ELEVENTH CIRCUIT
STABLES, SEP 27 1991

Petitioners, MIGUEL J. CORTEZ
CLERK

versus

UNITED STATES DEPARTMENT
OF AGRICULTURE,

Respondent.

Petition for Review of an Order of the
United States Department of Agriculture

ON PETITION(S) FOR REHEARING AND SUGGESTION(S)
OF REHEARING EN BANC

(Opinion August 14, 1991 , 11th Cir., 19 __,
__ F.2d __).

Before: BIRCH, Circuit Judge, TUTTLE*, Senior
Circuit Judge, and FULLAM**, Senior District
Judge.

(X) The Petition(s) for Rehearing are DENIED
and no member of this panel nor other Judge

in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

() The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

() A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is

denied.

entered for the court;

(s)

UNITED STATES CIRCUIT JUDGE

- * See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.
- ** Honorable John P. Fullam, Senior U.S. District Judge for the Eastern District of Pennsylvania, sitting by designation.



APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-8038

D.C. Docket No. 88-2

LARRY E. EDWARDS and
GARY R. EDWARDS d/b/a
CARL EDWARDS AND SONS STABLES,

DO NOT
PUBLISH

Petitioners,

versus

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

Petition for Review of an Order of the
United States Department of Agriculture

(August 14, 1991)

Before BIRCH, Circuit Judge, TUTTLE*, Senior
Circuit Judge, and FULLAM**, Senior District
Judge

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

"Costs taxed atainst petitioners."

*See Rule 34-2(b), Rules of the U.S. Court
of Appeals for the Eleventh Circuit.

**Honorable John P. Fullam, Senior U.S.
District Judge for the Eastern District of
Pennsylvania, sitting by designation.

Judgment Entered: August 14, 1991
For the Court: Miguel J. Cortez,
Clerk

By: /s/
Deputy Clerk

ISSUED AS MANDATE: OCT -7 1991

APPENDIX D



RECEIVED
U.S. Dept. of Agr.
DEC 14 1990

The Hearing Clerk
O A L J

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

| | | |
|------------------------------|---|---------------|
| In re: |) | HPA DOCKET |
| |) | No. 88-2 |
| Larry E. Edwards and |) | |
| Gary R. Edwards, d/b/a |) | Order Denying |
| Carl Edwards & Sons Stables, |) | Petition for |
| |) | Reconsidera- |
| Respondents, |) | tion |

Respondents' petition for reconsideration is denied for the reasons stated in the original decision filed herein and in complainant's opposing briefs. Respondents' argument that they were denied a fair hearing, in violation of their constitutional rights, comes too late and, in any event, is without merit. In many prior cases, the only evidence that a horse was sore was the professional opinion of the Department's veterinarians, based upon their palpation of the horse's

pasterns. Respondents' request that any disqualification period applicable to them be effective as to each consecutively, so that one of them would be free to show horses at all times for the partnership, would render the disqualification sanction ineffective to serve as a deterrent to future violations by respondents and others.

ORDER

The disqualification provisions of the order previously filed herein shall become effective, as to each respondent, on the 30th day after service of this order on said respondent.

The civil penalty shall be paid by each respondent by certified check or money order made payable to the Treasurer of the United States, which shall be forwarded to Donald A. Tracy, Office of the General Counsel, Room 2014-South Building, United States

Department of Agriculture, Washington D.C.
20250-1400, within 30 days from the date of
service of this order on said respondent.

Done at Washington, D.C.

December 14, 1990

/s/

Donald A. Campbell
Judicial Officer

APPENDIX E



RECEIVED
U.S. Dept. of Agr.
(date ?)

The Hearing Clerk
O A L J

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

| | | |
|------------------------------|---|------------|
| In re: |) | HPA DOCKET |
| |) | No. 88-2 |
| Larry E. Edwards and |) | |
| Gary R. Edwards, d/b/a |) | |
| Carl Edwards & Sons Stables, |) | Decision |
| |) | and Order |
| Respondents. |) | |

This is a disciplinary administrative proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. § 1821 et seq.). On August 30, 1989, Administrative Law Judge Dorothea A. Baker (ALJ) filed an initial Decision and Order in which she found that respondents entered two horses for the purpose of showing or exhibiting them at two shows, one at Shelbyville, Tennessee, and the other at Jackson, Mississippi, while the horses were sore. She assessed civil

penalties of \$2,000 against each respondent, and disqualified each respondent from showing or exhibiting any horse and from judging or managing any horse show, exhibition or auction for a period of 2 years.

On November 3, 1989, respondents appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).¹ The case was referred to the Judicial Officer for decision on March 22, 1990.

¹ The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed.Reg. 3219 (1953), reprinted in 5 U.S.C. app. at 1280 (1988). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

Oral argument before the Judicial Officer, which is discretionary (7 C.F.R. § 1.145(d)), was requested by respondents, but is denied inasmuch as the case has been fully briefed, many similar cases have been decided, and oral argument would appear to serve no useful purpose.

Upon a careful consideration of the record in this case, the initial Decision and Order is adopted as the final Decision and Order, with a few trivial editorial changes, and a few additions included within brackets. Additional concussions by the Judicial Officer follow the LAJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

Preliminary Statement

This is a disciplinary administrative proceeding instituted pursuant to the provisions of the Horse Protection Act of 1970 (15 U.S.C. §§ 1821-1831), hereinafter sometimes referred to as the "Act." It arises by reason

of a Complaint having been filed on December 3, 1987, by the Administrator of the Animal and Plant Health Inspection Service ("APHIS" of the United States Department of Agriculture wherein it is alleged, among other things, that on May 22, 1986, Respondents entered for the purpose of showing or exhibiting the horse, "Eb's Little Princess," in the Tennessee Walking Horse Spring Celebration Fun Show in Shelbyville, Tennessee while the horse was sore. It is further alleged that the horse, "Great Big Country," was entered, while sore, on April 9, 1987, at the Mississippi State Charity Horse Show in Jackson, Mississippi. The entry for the purpose of showing or exhibiting, of a sore horse is a violation of section 5(2)(B) of the Horse Protection Act, 15 U.S.C. § 1824(2)(B).

The Complainant seeks the imposition of civil penalties in the amounts of \$2,000.00

to be assessed against Respondent Larry E. Edwards, and, of \$4,000.00 to be assessed against the Respondent Gary R. Edwards. In addition thereto, the Complainant seeks a disqualification of 2 years as to Respondent Larry E. Edwards precluding him from showing, exhibiting, or entering any horse, or from judging, managing, or otherwise participating in any horse show for that 2-year period. Additionally, Complainant seeks disqualification against Respondent Gary R. Edwards for 5 years from showing, exhibiting or entering any horse, and from judging, managing or otherwise participating in any horse show during this 5-year disqualification.

The substantial weight of the credible, convincing evidence supports the allegations of the Comolaint, and, the Act and precedent cases of the Department of Agriculture require the sanctions sought herein, except for the requested period of disqualification

as to Respondent Gary Edwards. This has been reduced by the Judge to 1 years as well as a reduction in the amount of requested civil monetary penalties.

Section 6(c) of the Act (15 U.S.C. § 1825(c)) provides, inter alia, that "any person... who paid a civil penalty assessed under subsection (b) ...may be disqualified... for a period of not less than one year for the first violation and not less than five years for any subsequent violation." (Emphasis added) As part of a Consent Decision, Respondent Gary R. Edwards paid a \$1,000.00 civil penalty for a previously charged violation of the Act. (In re: R.F. Burgin, Jr. and Gary Edwards, 43 Agric. Dec. 378 (1984)). That Consent Decision provided, in part:

Respondent Gary Edwards admits the jurisdiction of the Secretary of Agriculture in this matter and waives hearing and further procedure herein. Mr. Edwards and the complainant consent to the issuance of this decision for the purpose

of settling this matter.

FINDINGS OF FACT

1. Gary Edwards is an individual residing at Route 4, Dawson, Georgia 31742. He was at all times material herein the trainer of the horse known as "Front Page Copy."

2. On or about August 16, 1979, respondent Edwards transported to the International Championship Walking Horse Show, Murfreesboro, Tennessee, and entered for the purpose of showing and exhibiting, and showed and exhibited, the horse "Front Page Copy" as entry 886 in Class No. 13.

3. In the opinions of examining veterinarians employed by the U.S. Department of Agriculture, the horse was sore when exhibited on August 16, 1979, as set forth in paragraph 2, above.

4. Respondent Edwards denies that the horse was sore on August 16, 1979, and disclaims any liability in this matter.

CONCLUSIONS

Respondent's admission of jurisdiction and his agreement with complainant as to the issuance of this decision warrant the entry of such decision in this matter.
(Emphasis added)

Under the circumstances, I am not of the opinion that the aforesaid prior Consent Decision triggers the 5-year minimum disqualification. Complainant has cited no case therefor and admits, "... the issue is not free from doubt."

On December 30, 1987, the Respondents, through counsel, submitted an Answer, denying that the two horses were sore as defined by the Act at the time they were entered for showing, and further denying that the Respondents have ever engaged in any of the practices prohibited by the Act. On July 7, 1988, the case was promptly set for oral hearing, which was designated to begin August 16, 1988, in Montgomery, Alabama.

On or about August 9, 1988, Respondents discharged their former counsel, and retained as counsel the law firm of Powell, Goldstein Frasier and Murphy. On August 10, 1988, Respondents' new counsel requested a 3-week

continuance of the oral hearing, so that Respondents' new counsel might have more than one week to prepare the case prior to the hearing. Complainant opposed this request for a continuance and the Administrative Law Judge denied it.

Thereafter, the oral hearing took place as scheduled on August 16 and 17, 1988, in Montgomery, Alabama, before Administrative Law Judge Dorothea A. Baker. The Complainant was represented by Donald A. Tracy, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. 20250, and the Respondents were represented by Jeffrey W. Kelly, Esquire, and Mark G. Trigg, Esquire, of the firm of Powell, Goldstein, Frasier and Murphy, with offices in Atlanta, Georgia, and Washington, D.C.

The last brief was filed herein on March 14, 1989, but the case was not referred for decision to the Administrative Law Judge

until June 2, 1989.

Pertinent Statutory Provisions

Section 1824(2)(B) of the Act states:

The following conduct is prohibited:

....

(2) The ... (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore.... (15 U.S.C. § 1824(2)(B))

The term "sore," when used to describe a horse in the Act, is defined as follows:

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse.

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse.

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and as a result of such application,

infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.
(15 U.S.C. § 1821(3)(D))

The Complaint seeks civil penalties pursuant to 15 U.S.C. §1825, which provides, in pertinent part, as follows:

(b)(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than \$2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited

conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(c) In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation....

Section 6(D)....

(5) In any civil or criminal action to enforce this Act or any regulation under this Act a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation

in both of its forelimbs or both
of its hindlimbs. (15 U.S.C.
1825(d)(5))

Findings of Fact

1. Respondents Larry E. Edwards and Gary R. Edwards are partners doing business as Carl Edwards & Sons Stables, located at Route 4 in Dawson, Georgia 31742.
2. On May 22, 1986, Respondent Larry Edwards entered the horse "Eb's Little Princess" as Entry No. 514, Class No. 2 at the Tennessee Walking Horse Spring Celebration Fun Show in Shelbyville, Tennessee, on behalf of the Carl Edwards & Sons Stables partnership. At all times material herein, Mr. Vincent Saia of New Orleans, Louisiana, was the owner of the horse "Eb's Little Princess." A Consent Decision was entered in this proceeding on August 19, 1988, as to Mr. Saia providing for disqualification as to him for one year.

3. Respondent Larry Edwards was the trainer of "Eb's Little Princess" beginning on April 20, 1986, and extending through and including May 22, 1986. Prior to April 20, 1986, Respondents had no knowledge of the previous training nor care given to "Eb's Little Princess."

4. The Shelbyville Fun Show as the first show in which "Eb's Little Princess" had ever been entered.

5. At all times material herein, Respondents Larry Edwards and Gary Edwards were the owners (along with their mother) of the horse known as "Great Big Country."

6. On April 9, 1987, Respondent Gary Edwards, on behalf of the Carl Edwards & Sons partnership entered "Great Big Country" at the Mississippi State Charity Horse Show in Jackson, Mississippi.

7. On May 22, 1986, "Eb's Little Princess" experienced pain in its front feet

when palpated when the Respondents entered it to show at the Fun Show in Shelbyville.

8. That pain was caused by the use of action devices or chemicals.

9. On April 9, 1987, "Great Big Country" experienced pain in both of its front feet when palpated when the Respondents entered it to show at the Mississippi State Charity [Horse] Show in Jackson.

10. That pain was caused by the use of action devices or chemicals.

11. On May 22, 1986, Respondents Larry E. Edwards and Gary R. Edwards, in violation of section 5(2)(B of the Act, 15 U.S.C. 1824(2)(B), entered for the purpose of showing or exhibiting the horse known as "Eb's Little Princess" under the name of "Princess of Power" as Entry No. 514, in Class No. 2, at the Tennessee Walking Horse Spring Celebration Fun Show in Shelbyville, Tennessee, while the horse was sore as defined in the Act.

12. On April 9, 1987, Respondents Larry E. Edwards and Gary R. Edwards, in violation of section 5(2)(B) of the Act, 15 U.S.C. 1824(2)(B), entered for the purpose of showing or exhibiting the horse known as "Great Big Country" as Entry No. 20, in Class No. 9 at the Mississippi State Charity Horse Show in Jackson, Mississippi, while the horse was sore as defined in the Act.

13. The Respondents have been actively involved in the forefront of the Tennessee Walking Horse Industry for more than 30 years. Since 1977, the Respondents have garnered 65 World Champions, including 17 World Grand Champions. In that same period of time, they have won 12 Reserve World Grand Championships and 22 Reserve World Championships. They have had more World Champions at the Celebration in 5 of the past 7 years than any other stable in the country. At the September 5, 1987, Celebration,

Respondent Larry Edwards won the World Grand Championship with "Coin's Hard Cash." Respondent Larry Edwards was also named the 1988 Walking Horse Traders' Association "Trainer of the Year."

14. Since 1970, the Respondents have entered approximately 11,000 Tennessee Walking Horses in competition. Of those 11,000 horses, less than 10 have failed the Designated Qualified Person (DQP) pre-showing examinations. Prior to the Complaint filed in this proceeding, Respondent Larry Edwards had never been charged with a violation of the Act. Respondent Gary Edwards had been previously charged with violating the Act in 1979 (In re: R.F. Burgin, Jr. & Gary Edwards, 43 Agric. Dec. 378 (1984)), but that matter was resolved through a Consent Decision in which Respondent Gary Edwards denied violating the Act.

15. As to Eb's Little Princess," the Respondents' defenses to the evidence presented by Complainant are not convincing. Although the DQP, Mr. Lonnie Messick, who examined "Eb's Little Princess," disqualified the horse from showing, Respondents' contend that the DQP applied standards of soreness in excess of those of APHIS, or disqualified the horse on some basis other than soreness. Actually, Mr. Messick found abnormal sensitivity in both front feet of the horse.

Equally without merit is the contention that the horse could not be sore because the U.S. Department of Agriculture veterinarians did not find other indices of pain, such as bleeding, scar tissue, oozing serum, labored breathing or excessive perspiration. It is not necessary that there be such indicia when there is clear evidence, such as that testified to by Dr. Riggins and Dr. Jordon, that the horse exhibited pain.

Thirdly, there was considerable testimony that the horse was "silly" about the feet. Dr. Riggins and Dr. Jordon, however, put this claim to rest in this case as they described the simple and effective examination procedure which they follow to remove any doubt about whether the horse is silly rather than in pain. (Tr. 60-62, 103-104). As Respondents' witness Mr. Puckett, a farrier for 24 years, a DQP for 16 years, and DQP Director for the Walking Horse Owners Association (Tr. 282) testified:

Q. Do you think that Dr. Tyler Riggins can tell the difference [between a horse that's silly about his feet and one that's sore]?

A. I'm sure he can.

Q. Do you think Dr. Glenn Jordon can tell the difference?

A. I'm sure he can. (Tr. 315-316).

Both doctors have examined thousands of horses and consciously took steps to be

certain the responses they obtained were caused by pain. Their findings were unequivocal that the specific, bilateral places where they found responses were caused by pain.

16. As to the horse "Great Big Country," two well-trained competent APHIS veterinarians (Tr. 125-126, 150-151) examined "Great Big Country" after the DQP disqualified the horse from showing because he found bilateral sensitivity. (Tr. 233). Both veterinarians conducted thorough and careful examinations (Tr. 128-131, 154-157) and both found the horse to be sore. (CX 3 [; TR. 131], 157). They identified very specific locations of pain and formed their medical opinions that the pain they found was caused by artificial means. (Tr. 133, 157; CX 3). Consistent with this finding is the fact that the Respondents did in fact work "Great Big Country" in chain chains 15 to 20 minutes a day. (Tr. 451). Chains and other action devices which are

not necessarily illegal, per se, are devices which, when they cause pain, result in a horse which meets the statutory definition of "sore."

The horse's response to examination showing pain upon palpation are not consistent with the Respondents' assertion that such responses were due to the horse being silly about its feet. Dr. Mandrell and Dr. Humphries assured themselves that the responses they obtained were caused by pain and not silliness. (Tr. 130-131, 156-157, 172-176).

Dr. Humphries has been examining horses for compliance with the Act for many years and Dr. Mandrell, though young, demonstrated his keen, clinical understanding of the examination procedures and findings. There was no hint that their findings were anything other than the result of thorough training, and highly competent exams. Moreover, as Dr. Mandrell explained, unless both

of the U.S.D.A. Veterinarians agree on their findings, the U.S. Department of Agriculture will not write a horse up as sore.

Respondents' further defense that the horse could not be sore in the absence of other indicia of pain is not legally sustainable. That premise is demonstrably false, however, as both veterinarians found additional evidence of pain. Dr. mandress described how the horse indicated pain by "hunkering in" its flanks and turning its head when the sore spots were palpated. (Tr. 129). Dr. Mandrell further testified that he obtained these pain responses by palpating using only moderate pressure which he estimated to be 15 to 20 percent of the maximum pressure which he could apply (Tr. 128).

Conclusions

The Department of Agriculture has a mandate to "end the unnecessary, cruel, and

inhumane practice of soring horses" (H.R. Rep. No. 1174, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S. Code Cong. & Admin. News 1696, 1698).

Section 1821 essentially provides that the term "sore" describes a horse whose limbs have been artificially treated to cause soreness. Subsections 1824(2) and (7) prohibit owners and trainers from showing sored horses.

The Act does not require knowledge of the horse's soreness on the part of the owner or trainer; if the horse was sored, the owner and trainer are liable, even though they may not have known of the soring.

Also, who sored either horse is not an element of the offense, nor must the Complainant demonstrate that someone intended to sore either horse. The 1976 amendments to the Act eliminated the need to show intent. In re: Thornton and Cantrell, 41 Agric. Dec.

870, 888 (1982 [, aff'd, 715 F.2d 508 (11th Cir. 1983)]. The fact that the Respondents had shown horses many times before with only a few being written up is also not relevant to whether the horses in this case were sore on the nights in question. It would not be relevant even if these particular horses had been examined previously without being written up, "that is totally irrelevant to the issue of whether or not a violation existed [on the nights in question]." In re: Thornton and Cantrell, 41 Agric. Dec. at 879.

Respondents Larry E. Edwards and Gary R. Edwards, d/b/a Carl Edwards & Sons Stables, were the trainers and exhibitors of the horse "Eb's Little Princess," which was entered on May 22, 1986, at the Tennessee Walking Horse Spring Celebration Fun Show in Shelbyville, Tennessee. The Respondents were the owners and trainers of the horse "Great Big Country," which was entered on April 9, 1987, in the

Mississippi State Charity Horse Show in Jackson, Mississippi. The horses were found to be sore.

The Respondents argue on brief that the Complainant has not discharged its burden of proof. Complainant need only prevail by a preponderance of the evidence. In re: McConnell, 44 Agric. Dec. 712 (1985) [, vacated in part, Nos. 85-3259, 3267, 3276 (6th Cir. Dec. 5, 1985) (consent order substituted for original order)]. In furtherance thereof, the Respondents have brought to the Court's attention their position regarding statutory presumption and burden of proof. In this regard the Respondents make note that among the provisions of 15 U.S.C. § 1825(d), is subsection (5) which provides as follows:

(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter, a horse shall be presumed to be a horse which is sore if it manifests

abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

Respondents, on brief, have discussed at length the case of Landrum v. Block, [Civ. No. 81-1035 (M.D. Tenn. June 25, 1981), printed in 40 Agric. Dec. 922 (1981)], where in United States District Court for the Middle District of Tennessee analyzed section 1825(d)(5) and ruled that "the presumption referred to in 15 U.S.C. § 1825(d)(5) must be interpreted in accordance with Federal Rule of Evidence 301. Any interpretation imposing a greater burden on respondents in civil proceedings under the Horse Protection Act allegedly would violate the due process clause of the fifth amendment." 40 Agric. Dec. at 926. Federal Rule of Evidence 301 exemplifies the shifting of the burden of production. This is clearly distinguishable from an irrebuttable presumption or a presumption that shifts the

ultimate burden of persuasion.

In reaching its decision, the Landrum Court, which is apparently the only Federal Court to ever rule on the question, noted that even if the Department of Agriculture is not seeking the criminal penalties which are provided for in the Act, "a defendant who loses in a civil proceeding cannot fully escape the taint of criminality." Id. at 925. The Court went on to remark that the potential civil penalties were not only very severe in terms of possible fines, but the respondent "... can also be barred from engaging in his livelihood for a lengthy (and apparently indefinite) period.... While such a disqualification may be significantly less onerous than incarceration, it certainly elevates the seriousness of these violations into a range far above the usual type of civil adjudication."

After recognizing the severity of the potential penalties which may be imposed under the Act, The Court made the following observation:

Given the quasi-criminal nature of civil proceedings under the Horse Protection Act, due process forbids the presumption of section 1825(d)(5) from shifting the burden of persuasion to defendants. [Citation omitted.] The burden of persuading the trier of fact that a horse was artofoca;;u spred remains with the Secretary from the beginning to the end of the administrative process. Id.

In concluding its analysis, the Landrum Court noted that although Federal Rule of Evidence 301 "does not directly apply to this type of proceeding, see Rule 1101, Fed.R. Evid., the Court concludes that this Rule should be the model in assuring a constitutional interpretation of section 1825(d)(5)."

Federal Rule of Evidence 301, in turn, provides as follows:

In all civil actions and proceedings not otherwise provided

for by act of Congress or by these Rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.

As applied to the proceedings in the above subject case, the Respondents submit that section 1825(d)(5) merely has the procedural impact of requiring the Respondents to come forward with some evidence which supports their position that the two horses at issue here were in fact not sore, as has been alleged. It is the Respondents' position that once this procedural burden of producing evidence has been adduced, the statutory presumption disappears, and the Complainant retains the burden of ultimate persuasion, and must prove by a preponderance of the evidence that the horses were in fact sore as they have been alleged.

There is no doubt that Respondent herein did produce some evidence that the horses were not sore as that term is defined in the Act on the nights in question to the effect that such horses were simply unusually nervous or high-strung, were silly about the feet, and did not wish to be physically palpated during their respective digital examination. However, the reliable, credible, and convincing evidence herein shows the horses were sore.

Complainant has proven through the testimony of four experienced, competent, and unbiased Doctors of Veterinary Medicine that "Eb's Little Princess" and Great Big Country" were sore as that term is defined in the Act when Respondents entered them to show on May 22, 1986, and April 9, 1987, respectively. Each doctor conducted a careful examination by palpating the horses' legs using only moderate pressure. When they found apparent

pain responses they followed their normal procedure, as they had thousands of other times, and verified that the responses were the result of pain. Based on the nature of the pain responses, the fact that it was bilateral and in similar location on each foot, they formed the medical opinion that the pain they indisputably found had to have been caused by either chemicals or action devices. The Act defines "sore" to include precisely this situation, that is, a horse which is experiencing or is likely to experience pain as a result of, inter alia, chemicals, or action devices. Each of the DQP's disqualified the horses from showing because of the pain they found, although maintaining that they were applying more stringent standards than those of the United States Department of Agriculture. DQP examinations have repeatedly been found less probative than the United States Department of

Agriculture examinations and the Judicial Officer has accorded less credence thereto.

There is no dispute that both horses exhibited abnormal, bilateral sensitivity. Therefore, even under Respondents' interpretation of 15 U.S.C. 1825(d)(5), Respondents have not met the need to present some convincing explanation for the sensitivity.

The Judicial Officer, who is the Secretary's final deciding official, has set forth his severe sanction policy, in In re: Mc McConnell, 44 Agric. Dec. 712 (1985) [, vacated in part, Nos. 85-3259, 3267, 3276 (6th Cir. Dec. 5, 1985) (consent order substituted for original order)], in which case he also announced his re-affirmation and intention not to follow the Eighth Circuit's holding in Burton v. United States of America, 683 F.2d 280 (8th Cir. 1982), except in that Circuit for reasons more fully set forth in Eldon Stamper, et al., 42 Agric.

Dec. 20, aff'd, 722 F.2d 1483 (9th Cir. 1984). In McConnell, it is expressly stated [44 Agric. Dec. at 724]:

...But the regulations expressly prohibit any chains, no matter how light, if their use causes the horse to be sore.... If the exhibitor uses them, and the owners allow such conduct, the Act and regulations make the owners and exhibitors absolute guarantors that action devices will not sore the horse....

In that case, the Judicial Officer further stated [44 Agric. Dec. at 726]:

Considering all of the circumstances, here, as in In re Thornton, 41 Agric. Dec. 870, 878-79, 890-94 (1982), aff'd, 715 F.2d 1508 (11th Cir. 1983), in which a later examination was also conducted by Dr. O'Brien, Dr. O'Brien's subsequent examination is not given as much weight as the more immediate examination by two USDA veterinarians. In Thornton, the Judicial Officer suggested (41 Agric. Dec. at 894 n.11):

If horse owners and trainers are interested in having an examination by private veterinarians of horses found sore by the Department, I would suggest that their associations

have two or more private veterinarians present at horse shows to examine horses immediately after the USDA examinations. If this is done, the Department should provide a Department employee to keep continuous watch over the horses to see that they are not tampered with. Perhaps the Department could immediately reexamine any horse not found sore by the private veterinarians, in the presence of the private veterinarians. Possibly, one or more private veterinarians could observe the initial USDA examinations (that would depend on whether their presence would interfere too much with the examinations). The Department should make every reasonable effort to accommodate a responsible effort to afford horse owners and exhibitors the right to have a meaningful independent examination.

Unless some such procedure is followed by horse owners and trainers, it is not likely that testimony by a single veterinarian conducted at some later time will outweigh testimony by two or more disinterested USDA veterinarians as to their examinations conducted shortly after a show.

What the Department's Veterinarians are to consider in their examination has also been the subject of the Judicial Officer's

determination in the case of In re: Rowland,
40 Agric. Dec. 1934 [, 1944] (1981):

Respondents argue ... that the Department's veterinarians must, in conducting their post-show examination, consider many variables, such as the threshold of pain of the individual horse, the action devices used on the horse, the length of time the horse has been worked and the track condition of the show ring. Nonsense! It is not the Department's veterinarians who must consider such variables. Rather, the horse's owner and trainer must consider such variables when they make the voluntary decision to use action devices on the horse during training or exhibitions.

See also, In re: Gray, 41 Agric. Dec. 253
[, 254-55] (1982):

It is not a necessary part of complainant's proof for the Department's veterinarians to guess or determine accurately the exact procedure used to sore a horse, e. e.g., whether by chains, chemicals or a combination of both. It is sufficient if the proof adequately demonstrates that the horse was sore....

Both horses were worked in action devices and the pain which the veterinarians found was consistent with the use of action

devices on a horse's legs. Respondents' reply to the section 1825(d)(5) presumption, and the Complainant's evidence, is the wholly untenable assertion that both horses were willy about their feet and that was the cause of their responses. This assertion is without any basis. All four United States Department of Agriculture doctors testified that they are familiar with high-strung, or nervous, or silly horses and follow a simple procedure to distinguish such horses from those that are experiencing pain. That is, they look for, and in both cases found, specific spots which were painful when palpated.

As testified to by Drs. Riggins and Jordon, they conduct their examinations in a consistent fashion palpating different areas of the horse's front legs looking for indications of pain.

After finding what appear to be pain responses evidenced by the horse trying to

jerk its foot away, they move to other parts of the leg and then return to the spot where they previously got a response. If the horse again gives a pain response they will go away from that spot and come back. This is done to be certain it is a pain response and not just a "silly" reaction. (TR 61, 103). As Dr. Riggins testified:

...If a horse is silly about his foot, you can be holding it and you can touch him anywhere and the horse is going to move. And the way to differentiate if he's sore or not is I will -- a certain spot, I'll go around to other places. I might even go further on his leg and palpate it. And the horse, if he's silly about it, you can tell other places where I know there is no pain, he exhibits some response, I know he's kind of silly. But then I can go back, if you get pain response every time you go back there, well, then, you know it's pain instead of being silly about his foot. (TR 61-2).

A nervous or silly horse will have a reaction upon palpation anywhere. "Eb's Little Princess" and "Great Big Country" both

responded only when a small area was palpated and both showed the response repeatedly when palpated there, but showed no response when palpated elsewhere.

"Ed's Little Princess" and "Great Big Country" were "sore" as that term is defined in the Act on the respective dates on which they were entered for the purpose of showing in the two aforementioned horse shows, in violation of section 5(2)(B) of the Act, 15 U.S.C. 1842(2)(B).

The record evidence is reflective of the exemplary record of these Respondents; however, this does not diminish the fact that entering or exhibiting a sore horse is unfair competition as to those horses which are not sore. Results falsely obtained from soring must be precluded. Stamper v. Secretary of Agriculture, 722 F.2d 1983 (9th Cir. 1984); Fleming v. U.S. Dep't of Agriculture, 713 F.2d 179 (6th Cir. 1983).

Section (6(c) of the Act (15 U.S.C. 1825[(c)]) provides that "any person ... who paid a civil penalty assessed under section (b) ... may be disqualified ... for a period of not less than one year for the first violation and not less than five years for any subsequent violation." Respondent Gary Edwards paid a \$1,000.00 civil penalty as part of a Consent Decision for a previously charged violation of the Act. (In re: R.F. Burgin, Jr. and Gary Edwards, 43 Agric. Dec. 378 (1984), in which he denied violation the Act.

There is doubt that such Consent Decision constitutes a "violation" of the Act pursuant to 15 U.S.C. § 1826(c). The Act does not specifically provide for the suspension of one who paid a civil penalty pursuant to a Consent Decision. Accordingly, I do not believe Respondent Gary Edwards is, or should be, subject to the minimum 5-year suspension

period provided in section 1825(c), nor to the civil penalty requested by Complainant.

The nature, circumstances, extent, and gravity of the prohibited conduct, along with the degree of culpability, history of prior offenses and the effect on Respondents' ability to continue business have been duly considered. Such consideration leads to a reduction of the penalty applicable to Gary Edwards from \$4,000.00 to \$2,000.00.

The Findings of Fact and Conclusions herein reflect an evaluation of the record as a whole. The Respondents have submitted a most able and enlightening brief herein and all of their contentions have been considered. To the extent either party has submitted requests or motions not ruled upon and to the extent, if any, they are inconsistent with this Decision and Order, they are denied.

The following Order fully accomplishes the purposes of the Department of Agriculture to preclude the unnecessary, cruel, and inhumane practice of soring horses, serves as a deterrent to others, and serves the ends of justice.

ADDITIONAL CONCLUSIONS
BY THE JUDICIAL OFFICER

Respondents contend that the evidence does not adequately support the ALJ's findings of fact, but an examination of the record in this proceeding reveals that complainant has shown much more than a preponderance of the evidence to support the allegations of the complaint, which is all that is required.²

²See Herman & MacLean v. Huddleston, 459 U.S. 375, 387-92 (1983); Steadman v. SEC, 450 U.S. 91, 92-104 (1981); In Re Rowland, 40 Agric. Dec. 1934, 1941 n.5 (1981), aff'd, 713 Fwd 179 (6th Cir. 1983); In re Gold Bell-I&S Jersey Farms, Inc., 37 Agric. Dec. 1336, 1346 (1978), aff'd, No. 78-3134 (D.N.J. May 25, 1979), aff'd mem., 614 F2d 770 (3d Cir. 1980).

Respondents contend, in particular, that no thermovision was used here, but thermovision has not been used by the Department at a horse show since about 1981 (Tr. 485-86). Ample precedent exists for finding that a horse was sored, based on the horse's reaction to palpation by the Department's veterinarians, without any thermovision evidence. See, e.g., In re Purvis, supra, 38 Agric. Dec. at 1273-74:

Both veterinarians determined that the horse was sored primarily because mild or light palpation of the pastern area of each front foot revealed a sensitive spot about the size of a dime on the medial surface of the bulb of the heel on the rear portion of each front foot. The sensitive spots were almost identically located on each foot, and were in the exact spot where the collar worn on the feet during the Show would "bang" as the feet moved up and down.

In In re Whaley, supra, 35 Agric. Dec. at 1523, it is stated:

Respondent Groover testified that the horse was not sored.

In addition, the respondents argued that complainant did not use a swab test,⁵ photographs or thermographs....

⁵As held in In re A.S. Holcomb, HPA Doc. No. 18, 35 Agr Dec [1165, 1167] (decided July 26, 1976), the professional opinion of a Department veterinarian based on his physical examination of a horse is sufficient to support a finding that a horse was sore.

In In re Gray, 41 Agric. Dec. 253, 254_55

(1982), it is stated:

Experience in many Horse Protection Act cases over the years demonstrates that many horses which have been sore show evidence of pain only on the anterior portion of the legs or only on the posterior portion of the legs. This is not unusual and does not discredit evidence that the horse was sore. It is not a necessary part of complainant's proof for the Department's veterinarians to guess or determine accurately the exact procedure used to sore a horse, e.g., whether by chains, chemicals or a combination of both. It is sufficient if the proof adequately demonstrates that the horse was sore. [Footnote omitted.] Moreover, the statute raises a presumption that a horse is sore "if it manifests abnormal sensitivity or inflammation

in both of its forelimbs or both of its hindlimbs" (15 U.S.C. § 1825(d)(5)). There is no requirement that the horse manifest abnormal sensitivity on both the anterior and posterior surfaces of its forelimbs or hindlimbs.

In In re Holcomb, 35 Agric. Dec. 1165, 1167 (1976), it is stated:

It is to be expected that in many, if not most, cases under the Horse Protection Act, the only evidence of soring will be the expert opinion of a veterinarian who testifies on the basis of his observation or examination that in his professional opinion, a particular horse was sored by the use of some chemical or mechanical agent, for the purpose of affecting its gait. It should be further expected that the veterinarian will frequently not be able to tell whether the soring agent used was mechanical, or chemical, or both. Unless this remedial statute is to be rendered sterile, the Government should not be required to prove the soring device or agent applied in a particular case.

Respondents also contend that horses are typically sored on the anterior portion of the front legs, but the quotations above show that it is not unusual to have a horse

sored only on the posterior portion of the front legs.

Respondents also argue that the sanction is too severe, but the sanction is not too severe, considering the serious nature of soring horses. The need for a severe sanction to achieve the remedial purposes of the Act is recognized in numerous cases, e.g., In re Thornton, 41 Agric. Dec. 870, 913-24 (1982), aff'd, 715 F.2d 1508 (11th Cir. 1983). Although the disqualification period for first time offenders is normally 1 year, rather than 2 years, the respondents here were found to have entered for exhibition two sored horses on two separate occasions.

For the foregoing reasons, the following order should be issued.

Order

1. Respondent Larry E. Edwards is disqualified for 2 years from showing, exhibiting, or entering any horse, and from judging,

managing, or otherwise participating in any horse show.

2. Respondent Gary R. Edwards is disqualified for 2 years from showing, exhibiting, or entering any horse, and from judging, managing, or otherwise participating in any horse show.

3. Respondent Larry E. Edwards is assessed a civil penalty of \$2,000.00.

4. Respondent Gary R. Edwards is assessed a civil penalty of \$2,000.00_____

Done at Washington, D.C.

June 29, 1990

/s/

Donald A. Campbell
Judicial Officer

APPENDIX F



RECEIVED
U.S. Dept. of Agr.
AUG 30 1989

The Hearing Clerk
O.A.L.J.

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

| | |
|------------------------------|--------------------|
| In re: |) HPA Docket |
| |) No. 88-2 |
| Larry Ed. Edwards and |) |
| Gary R. Edwards, d/b/a/ |) |
| Carl Edwards & Sons Stables, |) |
| |) <u>Decision</u> |
| Respondents. |) <u>and Order</u> |

Preliminary Statement

This is a disciplinary administrative proceeding instituted pursuant to the provisions of the Horse Protection Act of 1970 (15 U.S.C. §§ 1821-1831), hereinafter sometimes referred to as the "Act". It arises by reason of a Complaint having been filed on December 3, 1987, by the Administrator of the Animal and Plant Health Inspection Service ("APHIS") of the United States Department of Agriculture wherein it is alleged, among other

things, that on May 22, 1986, Respondents entered for the purpose of showing or exhibiting the horse, "Eb's Little Prince" in the Tennessee Walking Horse Spring Celebration Fun Show in Shelbyville, Tennessee while the horse was sore. It is further alleged that the horse, "Great Big Country" was entered, while sore, on April 9, 1987 at the Mississippi State Charity Horse Show in Jackson, Mississippi. The entry for the purpose of showing or exhibiting, of a sore horse is a violation of section 5(2)(B) of the Horse Protection Act, 15 U.S.C. § 1824(2)(B).

The Complainant seeks the imposition of civil penalties in the amounts of \$2,000.00 to be assessed against Respondent Larry E. Edwards, and, of \$4,000.00 to be assessed against the Respondent Gary R. Edwards. In addition thereto, the Complainant seeks a disqualification of two years as to

Respondent Larry E. Edwards precluding him from showing, exhibiting, or entering any horse, or from judging, managing, or otherwise participating in any horse show for that two year period. Additionally, Complainant seeks disqualification against Respondent Gary R. Edwards for five years from showing, exhibiting or entering any horse, and from judging, managing or otherwise participating in any horse show during this five year disqualification.

The substantial weight of the credible, convincing evidence supports the allegations of the Complaint, and, the Act and precedent cases of the Department of Agriculture require the sanctions sought herein, except for the requested period of disqualification as to Respondent Gary Edwards. This has been reduced by the Judge to two years as well as a reduction in the amount of requested civil monetary penalties.

Section 6(c) of the Act (15 U.S.C. § 1825) provides, inter alia, that "any person ... who paid a civil penalty assessed under subsection (b) ... may be disqualified ... for a period of not less than one year for the first violation and not less than five years for any subsequent violation." (Emphasis added) As part of a Consent Decision Respondent Gary R. Edwards paid a \$1,000.00 civil penalty for a previously charged violation of the Act. (In re: R. F. Burgin and Gary Edwards, 43 Agric. Dec. 378 (1984)). That Consent Decision provided, in part:

Respondent Gary Edwards admits the jurisdiction of the Secretary of Agriculture in this matter and waives hearing and further procedure herein. Mr. Edwards and the complainant consent to the issuance of this decision for the purpose of settling this matter.

FINDINGS OF FACT

1. Gary Edwards is an individual residing at Route 4, Dawson, Georgia 31742. He was at all times material herein the trainer of the

c)

horse known as "Front Page Copy."

2. On or about August 16, 1979, respondent Edwards transported to the International Championship Walking Horse Show, Murfreesboro, Tennessee, and entered for the purpose of showing and exhibiting, and showed and exhibited, the horse "Front Page Copy as entry 886 in Class No. 13.

3. In the opinions of examining veterinarians employed by the U.S. Department of Agriculture, the horse was sore when exhibited on August 16, 1979, as set forth in paragraph 2, above.

4. Respondent Edwards denies that the horse was sore on August 16, 1979, and disclaims any liability in this matter.

CONCLUSIONS

Respondent's admission of jurisdiction and his agreement with complainant as to the issuance of this decision warrant the entry of such decision in this matter.
(Emphasis added)

Under the circumstances, I am not of the opinion that the aforesaid prior Consent Decision triggers the five-year minimum disqualification. Complainant has cited no case therefor and admits, "... the issue is not

free from doubt."

On December 30, 1987, the Respondents, through counsel, submitted an Answer, denying that the two horses were sore as defined by the Act at the time they were entered for showing, and further denying that the Respondents have ever engaged in any of the practices prohibited by the Act. On July 7, 1988, the case was promptly set for oral hearing, which was designated to begin August 16, 1988, in Montgomery, Alabama.

On or about August 9, 1988, Respondents discharged their former counsel, and retained as counsel the law firm of Powell, Goldstein, Frasier and Murphy. On August 10, 1988, Respondents' new counsel requested a three week continuance of the oral hearing, so that Respondents' new counsel might have more than one week to prepare the case prior to the hearing. Complainant opposed this request for a continuance and the Administrative

Law Judge denied it.

Thereafter, the oral hearing took place as scheduled on August 16 and 17, 1988, in Montgomery, Alabama, before Administrative Law Judge Dorothea A. Baker. The Complainant was represented by Donald A Tracy, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. 20250 and the Respondents were represented by Jeffrey W. Kelly, Esquire, and Mark G. Trigg, Esquire, of the firm of Powell, Goldstein, Frasier and Murphy, with offices in Atlanta, Georgia, and Washington, D.C.

The last brief was filed herein on March 14, 1989 but the case was not referred for decision to the Administrative Law Judge until June 2, 1989.

Pertinent Statutory Provisions

Section 1824(2)(B) of the Act states:

The following conduct is prohibited: ...(2) The ...(b) entering for the purpose of showing or

exhibition, any horse which is sore. (15 U.S.C. § 1824(2)(B))

The term "sore" when used to describe a horse in the Act is defined as follows:

- (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
- (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,
- (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or
- (D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use or practice in connection with the therapeutic treatment of a horse by or under the supervision of a

person licensed to practice veterinary medicine in the State in which such treatment was given.
(15 U.S.C. § 1821(3)(D))

The Complaint seeks civil penalties pursuant to 15 U.S.C. § 1825, which provides, in pertinent part, as follows:

- (b)(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than \$2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other

matters as justice may require.

- (C) In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation....

Section 6(d) * * *

(5) In any civil or criminal action to enforce this Act or any regulation under this Act a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs. (15 U.S.C. 1825(d)(5))

- Findings of Fact

1. Respondents Larry E. Edwards and Gary R. Edwards are partners doing business as Carl Edwards and Sons Stables, located at Route 4 in Dawson, Georgia 31742.

2. On May 22, 1986, Respondent Larry Edwards entered the horse "Eb's Little Princess" as Entry No. 514, Class No. 2 at the Tennessee Walking Horse Spring Celebration Fun Show in Shelbyville, Tennessee, on behalf of the Carl Edwards and Sons Stables partnership. At all times material herein, Mr. Vincent Saia of New Orleans, Louisiana, was the owner of the horse "Eb's Little Princess." A Consent Decision was entered in this proceeding on August 19, 1988, as to Mr. Saia providing for disqualification as to him for one year.

3. Respondent Larry Edwards was the trainer of "Eb's Little Princess" beginning on April 20, 1986, and extending through and including May 22, 1986. Prior to April 20, 1986, Respondents had no knowledge of the

previous training nor care given to "Eb's Little Princess."

4. The Shelbyville Fun Show was the first show in which "Eb's Little Princess" had ever been entered.

5. At all times material herein, Respondents Larry Edwards and Gary Edwards were the owners (along with their mother) of the horse known as "Great Big Country."

6. On April 9, 1987, Respondent Gary Edwards, on behalf of the Carl Edwards and Sons partnership entered "Great Big Country" at the Mississippi State Charity Horse Show in Jackson, Mississippi.

7. On May 22, 1986, "Eb's Little Princess" experienced pain in its front feet when palpated when the Respondents entered it to show at the Fun Show in Shelbyville.

8. That pain was caused by the use of action devices or chemicals.

9. On April 9, 1987, "Great Big Country"

experienced pain in both of its front feet when palpated when the Respondents entered it to show at the Mississippi State Charity Show in Jackson.

10. That pain was caused by the use of action devices or chemicals.

11. On May 22, 1986, Respondents Larry E. Edwards and Gary R. Edwards, in violation of section 5(2)(B) of the Act, 15 U.S.C. 1842(2)(B), entered for the purpose of showing or exhibiting the horse known as "Eb's Little Princess" under the name of "Princess of Power" as Entry No. 514, in Class No. 2, at the Tennessee Walking Horse Spring Celebration Fun Show in Shelbyville, Tennessee, while the horse was sore as defined in the Act.

12. On April 9, 1987, Respondents Larry E. Edwards and Gary R. Edwards, in violation of section 5(2)(B) of the Act, 15 U.S.C. 1824(2)(B), entered for the purpose of showing or exhibiting the horse known as "Great

Big Country" as Entry No. 20, in Class No. 9, at the Mississippi State Charity Horse Show in Jackson, Mississippi, while the horse was sore as defined in the Act.

13. The Respondents have been actively involved in the forefront of the Tennessee Walking Horse Industry for more than thirty years. Since 1977, the Respondents have garnered 65 World Champions, including 17 World Grand Champions. In that same period of time, they have won 12 Reserve World Grand Championships and 22 Reserve World Championships. They have had more World Champions at the Celebration in five of the last seven years than any other stable in the country. At the September 5, 1987 Celebration, Respondent Larry Edwards won the World Grand Championship with "Coin's Hard Cash". Respondent Larry Edwards was also named the 1988 Walking Horse Traders' Association "Trainer of the Year."

14. Since 1970, the Respondents have entered approximately 11,000 Tennessee Walking Horses in competition. Of those 11,000 horses, less than ten have failed the Designated Qualified Person (DQP) pre-showing examinations. Prior to the Complaint filed in this proceeding, Respondent Larry Edwards had never been charged with a violation of the Act. Respondent Gary Edwards had been previously charged with violating the Act in 1979 (In re: Burgin & Gary Edwards, 43 Agric. Dec. 378 (1984)), but that matter was resolved through a Consent Decision in which Respondent Gary Edwards denied violating the Act.

15. As to "Eb's Little Princess" the Respondents' defenses to the evidence presented by Complainant are not convincing. Although the DQP, Mr. Lonnie Messick, who examined "Eb's Little Princess," disqualified the horse from showing, Respondents' contend

that the DQP applied standards of soreness in excess of those of APHIS, or disqualified the horse on some basis other than soreness. Actually, Mr. Messick found abnormal sensitivity in both front feet of the horse.

Equally without merit is the contention that the horse could not be sore because the U.S. Department of Agriculture veterinarians did not find other indices of pain, such as bleeding, scar tissue, oozing serum, labored breathing or excessive perspiration. It is not necessary that there be such indicia when there is clear evidence, such as that testified to by Dr. Riggins and Dr. Jordon, that the horse exhibited pain.

Thirdly, there was considerable testimony that the horse was "silly" about the feet. Dr. Riggins and Dr. Jordon, however, put this claim to rest in this case as they described the simple and effective examination procedure which they follow to remove any doubt about

whether the horse is silly rather than in pain. (Tr. 60-62, 103-104). As Respondents' witness Mr. Puckett, a farrier for twenty-four years, a DQP for sixteen years, and DQP Director for the Walking Horse Owners Association (TR. 282) testified:

Q. Do you think that Dr. Tyler Riggins can tell the difference [between a horse that's silly about his feet and one that's sore]?

A. I'ms sure he can.

Q. Do you think Dr. Glenn Jordon can tell the difference?

A. I'm sure he can. (Tr. 315-316).

Both doctors have examined thousands of horses and consciously took steps to be certain the responses they obtained were caused by pain. Their findings were unequivocal that the specific, bilateral places where they found responses were caused by pain.

16. As to the horse "Great Big Country," two well-trained and competent APHIS veterinarians (Tr. 125-126, 150-151) examined

"Great Big Country" after the DQP disqualified the horse from showing because he found bilateral sensitivity. (Tr. 233). Both veterinarians conducted thorough and careful examinations (Tr. 128-131, 154-157) and both found the horse to be sore. (CX 3, 131, 157). They identified very specific locations of pain and formed their medical opinions that the pain they found was caused by artificial means. (Tr. 133, 157; CX 3). Consistent with this finding is the fact that the Respondents did in fact work "Great Big Country" in chains fifteen to twenty minutes a day. (Tr. 451). Chains and other action devices which are not necessarily illegal, per se, are devices which, when they cause pain, result in a horse which meets the statutory definition of "sore".

The horse's response to examination showing pain upon palpation are not consistent with the Respondents' assertion that such

responses were due to the horse being silly about its feet. Dr. Mandrell and Dr. Humphries assured themselves that the responses they obtained were caused by pain and not silliness. (Tr. 130-131, 156-157, 172-176).

Dr. Humphries has been examining horses for compliance with the Act for many years and Dr. Mandrell, though young, demonstrated his keen, clinical understanding of the examination procedures and findings. There was no hint that their findings were anything other than the result of thorough training, and highly competent exams. Moreover, as Dr. Mandress explained, unless both of the U.S.D.A. Veterinarians agree on their findings, the U.S. Department of Agriculture will not write a horse up as sore.

Respondents' further defense that the horse could not be sore in the absence of other indicia of pain is not legally sustainable. That premise is demonstrably false,

however, as both veterinarians found additional evidence of pain. Dr. Mandrell described how the horse indicated pain by "hunkering in" its flanks and turning its head when the sore spots were palpated. (Tr. 129). Dr. Mandress further testified that he obtained these pain responses by palpating using only moderate pressure which he estimated to be fifteen to twenty percent of the maximum pressure which he could apply. (Tr. 128).

Conclusions

The Department of Agriculture has a mandate to "end the unnecessary, cruel, and inhumane practice of soring horses" (H.Rep. 94-1174, 94th Cong., 2nd Sess. 4 (1976), reprinted in (1976) 3 U.S. Code Cong. and Ad. News 1696, 1698).

Section 1821 essentially provides that the term "sore" describes a horse whose limbs have been artificially treated to cause

soreness. Subsections 1824(2) and (7) prohibit owners and trainers from showing sored horses.

The Act does not require knowledge of the horse's soreness on the part of the owner or trainer; if the horse was sored, the owner and trainer are liable, even though they may not have known of the soring.

Also, who sored either horse is not an element of the offense, nor must the Complainant demonstrate that someone intended to sore either horse. The 1976 Amendments to the Act eliminated the need to show intent. In re: Thornton and Cantrell, 41 Agric. Dec. 870, 888 (1982). The fact that the Respondents had shown horses many times before with only a few being written up is also not relevant to whether the horses in this case were sore on the nights in question. It would not be relevant even if these particular horses had been examined previously without being written up, "that is totally irrelevant

to the issue of whether or not a violation existed [on the nights in question]." In re: Thornton and Cantrell, 41 Agric. Dec. 870, 879 (1982).

Respondents Larry E. Edwards and Gary R. Edwards, d/b/a Carl Edwards and Sons Stables, were the trainers and exhibitors of the horse "Eb's Little Princess", which was entered on May 22, 1986 at the Tennessee Walking Horse Spring Celebration Fun Show in Shelbyville, Tennessee. The Respondents were the owners and trainers of the horse "Great Big Country", which was entered on April 9, 1987, in the Mississippi State Charity Horse Show in Jackson, Mississippi. The horses were found to be sore.

The Respondents argue on brief that the Complainant has not discharged its burden of proof. Complainant need only prevail by a preponderance of the evidence. In re: McConnell, 44 Agric. Dec. 712 (1985). In

furtherance thereof, the Respondents have brought to the Court's attention their position regarding statutory presumption and burden of proof. In this regard the Respondents make note that among the provisions of 15 U.S.C. § 1825(d), is subsection (5) which provides as follows:

(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter, a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

Respondents, on brief have discussed at length, the case of Landrum v. Block, 40 Agric. Dec. 922 (Northern District of Tennessee 1981), wherein United States District Court for the Middle District of Tennessee analyzed section 1825(d)(5) and ruled that "the presumption referred to in 15 U.S.C. § 1825(d)(5) must be interpreted in accordance with Federal Rule of Evidence 301. Any interpretation imposing a greater

burden on Respondents in civil proceedings under the Horse Protection Act allegedly would violate the due process clause of the Fifth Amendment." 40 Agric. Dec. at 926. Federal Rule of Evidence 301 exemplifies the shifting of the burden of production. This is clearly distinguishable from an irrebuttable presumption or a presumption that sifts the ultimate burden of persuasion.

In reaching its decision, the Landrum Court, which is apparently the only Federal Court to ever rule on the question, noted that even if the Department of Agriculture is not seeking the criminal penalties which are provided for in the Act, "a defendant who loses in a civil proceeding cannot fully escape the taint of criminality." Id. at 925. The Court went on to remark that the potential civil penalties were not only very severe in terms of possible fines, but the respondent "... can also be barred from

engaging in his livelihood for a lengthy (and apparently indefinite) period ... While such a disqualification may be significantly less onerous than incarceration, it certainly elevates the seriousness of these violations into a range far above the usual type of civil adjudication."

After recognizing the severity of the potential penalties which may be imposed under the Act, the Court made the following observation:

Given the quasi criminal nature of the civil proceedings under the Horse Protection Act, due process forbids the presumption of section 1825(d)(5) from shifting the burden of persuasion to defendants. (cits.) The burden of persuading the trier of fact that a horse was artificially sore remains with the Secretary from the beginning to the end of the administrative process. Id.

In concluding its analysis, the Landrum Court noted that although Federal Rule of Evidence 301 "does not directly apply to this type of proceeding, see Rule 1101,

Fed. R. Evid., the Court concludes that this Rule should be the model in assuring a constitutional interpretation of section 1825(d)(5)."

Federal Rule of Evidence 301, in turn, provides as follows:

In all civil actions and proceedings not otherwise provided for by act of Congress or by these Rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.

As applied to the proceedings in the above subject case, the Respondents submit that section 1825(d)(5) merely has the procedural impact of requiring the Respondents to come forward with some evidence which supports their position that the two horses at issue here were in fact not sore, as has been alleged. It is the Respondents' position

that once this procedural burden of producing evidence has been adduced, the statutory presumption disappears, and the Complainant retains the burden of ultimate persuasion, and must prove by a preponderance of the evidence that the horses were in fact sore as they have been alleged.

There is no doubt that Respondent herein did produce some evidence that the horses were not sore as that term is defined in the Act on the nights in question to the effect that such horses were simply unusually nervous or high-strung, were silly about the feet, and did not wish to be physically palpated during their respective digital examination. However, the reliable, credible, and convincing evidence herein shows the horses were sore.

Complainant has proved through the testimony of four experienced, competent, and unbiased Doctors of Veterinary Medicine that

"Eb's Little Princess" and Great Big Country" were sore as that term is defined in the Act when Respondents entered them to show on May 22, 1986, and April 9, 1987, respectively. Each doctor conducted a careful examination by palpating the horses' legs using only moderate pressure. When they found apparent pain responses they followed their normal procedure, as they had thousands of other times, and verified that the responses were the result of pain. Based on the nature of the pain responses, the fact that it was bilateral and in similar location on each foot, they formed the medical opinion that the pain they indisputably found had to have been caused by either chemicals or action devices. The Act defines "sore" to include precisely this situation, that is, a horse which is experiencing or is likely to experience pain as a result of, inter alia, chemicals, or action devices. Each of the

DQP's disqualified the horses from showing because of the pain they found, although maintaining that they were applying more stringent standards than those of the United States Department of Agriculture. DQP examinations have repeatedly been found less probative than the United States Department of Agriculture examinations and the Judicial Officer has accorded less credence thereto.

There is no dispute that both horses exhibited abnormal, bilateral sensitivity. Therefore, even under Respondents' interpretation of 15 U.S.C. 1825(d)(5), Respondents have not met the need to present some convincing explanation for the sensitivity.

The Judicial Officer, who is the Secretary's final deciding official, has set forth his severe sanction policy, in In re: McConnell, 44 Agric. Dec. 712 (1985) in which case he also announced his re-affirmation and intention not to follow the Eighth Circuit's

holding in Burton v. United States of America, 683 F.2d 280 (8th Cir. 1982), except in that Circuit for reasons more fully set forth in Eldon Stamper, et al., 42 Agric. Dec. 20, aff'd, 722 F.2d 1483 (9th Cir. 1984). In McConnell it is expressly stated:

... But the regulations expressly prohibit any chains, no matter how light, if their use causes the horse to be sores If the exhibitor uses them, and the owners allow such conduct, the Act and regulations make the owners and exhibitors absolute guarantors that action devices will not sore the horse....

In that case, judicial Officer further stated:

Considering all of the circumstances, here, as in In re Thornton, 41 Agric. Dec. 870, 878-79, 890-94 (1982), aff'd, 715 F.2d 1508 (11th Cir. 1983), in which a later examination was also conducted by Dr. O'Brien, Dr. O'Brien's subsequent examination is not given as much weight as the more immediate examination by two USDA veterinarians. In Thornton, the Judicial Officer suggested (41 Agric. Dec. at 894 n.11):

If horse owners and trainers are interested in having an examination by private veterinarians of horses found sore by the Department, I would suggest that their associations have two or more private veterinarians present at horse shows to examine horses immediately after the USDA examinations. If this is done, the Department should provide a Department employee to keep continuous watch over the horses to see that they are not tampered with. Perhaps the Department could immediately reexamine any horse not found sore by the private veterinarians, in the presence of the private veterinarians. Possibly, one or more private veterinarians could observe the initial USDA examinations (that would depend on whether their presence would interfere too much with the examinations). The Department should make every reasonable effort to accommodate a responsible effort to afford horse owners and exhibitors the right to have a meaningful independent examination.

Unless some such procedure is followed by horse owners and trainers, it is not likely that testimony by a single veterinarian conducted at some later time will outweigh testimony by two or more disinterested USDA veterinarians as to their examinations conducted shortly after a show.

What the Department's Veterinarians are to consider in their examination has also been the subject of the Judicial Officer's determination in the case of In re: Rowland, 40 A.D. 1934 (1981):

Respondent argue ... that the Department's veterinarians must, in conducting their post-show examination, consider many variable, such as the threshold of pain of the individual horse, the action devices used on the horse, the length of time the horse has been worked and the track condition of the show ring. Nonsense! It is not the Department's veterinarians who must consider such variables. Rather, the horse's owner and trainer must consider such variables when they make the voluntary decision to use action devices on the horse during training or exhibitions.

See also, In re Gray, 41 Agric. Dec. 253 (1982):

... It is not a necessary part of complainant's proof for the Department's veterinarians to guess or determine accurately the exact procedure used to sore a horse, e.g., whether by chains, chemicals or a combination of both. It is sufficient if the proof adequately demonstrates that the horse was sore....

Both horses were worked in action devices and the pain which the veterinarians found was consistent with the use of action devices on a horse's legs. Respondents' reply to the section 1825(d)(5) presumption, and the Complainant's evidence, is the wholly untenable assertion that both horses were silly about their feet and that was the cause of their responses. This assertion is without any basis. All four United States Department of Agriculture doctors testified that they are familiar with high strung, or nervous, or silly horses and follow a simple procedure to distinguish such horses from those that are experiencing pain. That is, they look for, and in both cases found, specific spots which were painful when palpated.

As testified to by Drs. Riggins and Jordon, they conduct their examinations in a consistent fashion palpating different areas of the horse's front legs looking for indications of pain.

After finding what appear to be pain responses evidenced by the horse trying to jerk its foot away they move to other parts of the leg and then return to the spot where they previously got a response. If the horse again gives a pain response they will go away from that spot and come back. This is done to be certain it is a pain response and not just a "silly" reaction. (Tr. 61, 103). As Dr. Riggins testified:

... if a horse is silly about his foot, you can be holding it and you can touch him anywhere and the horse is going to move. And the way to differentiate if he's sore or not is I will -- a certain spot -- if that horse is moving when I touch that certain spot, I'll go around to other places. I might even go further on his leg and palpate it. And the horse, if he's silly about it, you can tell other places where I know there is no pain, he exhibits some response, I know he's kind of silly. But then I go back, if you get pain response every time you go back there, well, then you know it's pain instead of being sill about his foot. (Tr. 61-62).

A nervous or silly horse will have a reaction upon palpation anywhere. "Eb's Little Princess" and "Great Big Country" both responded only when a small area was palpated and both showed the response repeatedly when palpated there, but showed no response when palpated elsewhere.

"Eb's Little Princess" and "Great Big Country" were "sore" as that term is defined in the Act on the respective dates on which they were entered for the purpose of showing in the two aforementioned horse shows, in violation of Section 5(2)(B) of the Act, 15 U.S.C. 1824(2)(B).

The record evidence is reflective of the exemplary record of these Respondents; however, this does not diminish the fact that entering or exhibiting a sore horse is unfair competition as to those horses which are not sore. Results falsely obtained from soring must be precluded. Stamper v.

Secretary of Agriculture, 722 F.2d 1983
(9th Cir. 1984); Fleming v. U.S. Dep't of
Agriculture, 713 F.2d 179 (6th Cir. 1983).

Section 6(c) of the Act (15 U.S.C. 1825) provides that "any person ... who paid a civil penalty assessed under subsection (b) ... may be disqualified ... for a period of not less than one year for the first violation and not less than five years for any subsequent violation." Respondent Gary Ed Edwards paid a \$1,000.00 civil penalty as part of a Consent Decision for a previously charged violation of the Act. (In re: R.F. Burgin and Gary Edwards, 43 Agric. Dec. 378 (1984), in which he denied violating the Act.

There is doubt that such Consent Decision constitutes a "violation" of the Act pursuant to 15 U.S.C. § 1825(C). The act does not specifically provide for the suspension of one who paid a civil penalty pursuant to a Consent Decision. Accordingly, I do not

believe Respondent Gary Edwards is, or should be, subject to the minimum five-year suspension period provided in section 1825(C), nor to the civil penalty requested by Complainant.

The nature, circumstances, extent, and gravity of the prohibited conduct, along with the degree of culpability, history of prior offenses and the effect on Respondents' ability to continue business have and been duly considered. Such consideration leads to a reduction of the penalty applicable to Gary Edwards from \$4,000.00 to \$2000.00.

The Findings of Fact and Conclusions herein reflect an evaluation of the record as a whole. The Respondents have submitted a most able and enlightening brief herein and all of their contentions have been considered. To the extent either party has submitted requests or motions not ruled upon and to the

extent, if any, they are inconsistent with this Decision and Order, they are denied.

The following Order fully accomplishes the purposes of the Department of Agriculture to preclude the unnecessary, cruel, and inhuman practice of soring horses, serves as a deterrent to others, and serves the ends of justice.

Order

1. Respondent Larry E. Edwards is disqualified for two years from showing, exhibiting, or entering any horse, and from judging, managing, or otherwise participating in any horse show.

2. Respondent Gary R. Edwards is disqualified for two years from showing, exhibiting, or entering any horse, and from judging, managing, or otherwise participating in any horse show.

3. Respondent Larry E. Edwards is assessed a civil penalty of \$2,000.00.

4. Respondent Gary R. Edwards is assessed a civil penalty of \$2,000.00.

This Decision and Order shall become final Thirty-Five days after service hereof upon the parties, unless appealed to the Judicial Officer within Thirty days after service thereof as provided in the Rules of Practice and Procedure (7 C.F.R. § 1.130, et seq.).

Copies hereof shall be served upon the parties.

Done at Washington, D.C.
this (30th) day of
August, 1989.

/s/

Dorothea A. Baker
Administrative Law Judge

MAR 2 1992

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In the Supreme Court of the United States

OCTOBER TERM, 1991

LARRY E. EDWARDS AND GARY R. EDWARDS, dba
CARL EDWARDS AND SONS STABLES, PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Department of Agriculture's finding that two of petitioners' horses were "sore" within the meaning of the Horse Protection Act, 15 U.S.C. 1821(3), was supported by substantial evidence.

2. Whether petitioners were deprived of their right to due process or any other constitutional right in connection with the proceedings in this case.

3. Whether the Department of Agriculture's policy of directing its enforcement of the Horse Protection Act primarily at Tennessee walking horses is unconstitutional.

4. Whether the Department of Agriculture abused its discretion when, as a sanction for violations of the Horse Protection Act, it suspended petitioners from participating in horse shows for two years.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1068

LARRY E. EDWARDS AND GARY R. EDWARDS, dba
CARL EDWARDS AND SONS STABLES, PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. C40-C41) is unreported, but the judgment is noted at 943 F.2d 1318 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1991. A petition for rehearing was denied on September 27, 1991 (Pet. App. B37-B39). The petition for a writ of certiorari was filed on December 26, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Horse Protection Act, 15 U.S.C. 1821 *et seq.*, was enacted to end the practice of "soring" Tennessee walking horses in order to enhance their performance at horse shows. See 15 U.S.C. 1822. Contestants in those shows would deliberately injure the feet of their horses, typically with chains or chemicals. The resulting pain would cause the horses to walk with the distinctive high-stepping gait that show judges look for in a champion horse. See H.R. Rep. No. 1597, 91st Cong., 2d Sess. 2 (1970).

The Act prohibits, among other things, "entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore." 15 U.S.C. 1824(2)(B). The Act defines "sore" as follows (15 U.S.C. 1821(3)):

The term "sore" when used to describe a horse means that—

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or

distress, inflammation, or lameness when walking, trotting, or otherwise moving * * *

A horse is presumed to be sore if "it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs." 15 U.S.C. 1825(d)(5).

The Act provides civil and criminal penalties for violations. 15 U.S.C. 1825(a)-(c). The Secretary of Agriculture is authorized to impose civil penalties of up to \$2000 and to suspend violators from participating in horse shows for a minimum of one year for a first offense. 15 U.S.C. 1825(b)(1) and (c). In an administrative proceeding seeking either of those sanctions, an alleged violator of the statute is entitled to a hearing before an administrative law judge, followed by an administrative appeal to the Department of Agriculture's Judicial Officer¹ and by judicial review.

2. a. The administrative complaint in this case alleged that petitioners entered two horses in horse shows while the horses were "sore." On May 22, 1986, a horse trained by petitioner Larry Edwards on behalf of Carl Edwards and Sons Stables was entered in a horse show in Shelbyville, Tennessee. The Designated Qualified Person (DQP) at the show (an employee of the show management whose function is to assure that sore horses are not allowed to participate) examined the horse and disqualified it from the show. The DQP testified at the administrative hearing that he palpated the horse's feet, found that the horse was sensitive, and determined that there was enough reaction to disqualify the horse. The horse was later examined by two USDA veterinarians, who also palpated the horse. Both doc-

¹ The Secretary of Agriculture has delegated his authority to review decisions under the Horse Protection Act to the Department's Judicial Officer. See 7 C.F.R. 2.35.

tors were experienced in detecting soreness in Tennessee walking horses; both concluded that the horse experienced pain in both front feet and that the pain was caused by the use of a device to exaggerate his gait and/or by chemicals. Gov't C.A. Br. 4-6.

On April 9, 1987, a second horse, owned jointly by petitioners and their mother and trained by petitioner Gary Edwards on behalf of Carl Edwards and Sons Stables, was entered in a horse show in Jackson, Mississippi. The DQP at Jackson disqualified the horse from the show, after checking the horse's feet for sensitivity. The horse was then examined by two USDA veterinarians, both of whom palpated the horse. Both veterinarians concluded that the horse experienced pain in both front feet and was sore within the meaning of the Horse Protection Act. Gov't C.A. Br. 6.

At the administrative hearing, the Department of Agriculture relied on the testimony of the four veterinarians who had examined the horses in question. The ALJ found (Pet. App. F117-F118):

Complainant has proved through the testimony of four experienced, competent, and unbiased Doctors of Veterinary Medicine that [both horses] were sore as that term is defined in the Act when [petitioners] entered them to show on May 22, 1986, and April 9, 1987, respectively. Each doctor conducted a careful examination by palpating the horses' legs using only moderate pressure. When they found apparent pain responses they followed their normal procedure, as they had thousands of other times, and verified that the responses were the result of pain. Based on the nature of the pain responses, the fact that it was bilateral and in similar location on each foot, they formed the medical opinion that the pain they indisputably found had to have been caused by

either chemicals or action devices. The Act defines "sore" to include precisely this situation, that is, a horse which is experiencing or is likely to experience pain as a result of, *inter alia*, chemicals, or action devices.

The ALJ rejected petitioners' assertion that the horses "were simply unusually nervous or high-strung, were silly about the feet, and did not wish to be physically palpated during their respective digital examination," finding that contention to be inconsistent with "reliable, credible, and convincing evidence." *Id.* at F117.

The ALJ's order suspended petitioners from participating in horse shows for two years and assessed a civil penalty of \$2000 against each of them. Pet. App. F128-F129.

b. Petitioners took an administrative appeal to the Department of Agriculture's Judicial Officer.² The Judicial Officer adopted the ALJ's findings and conclusions with only minor changes, finding that the government "has shown much more than a preponderance of the evidence to support the allegations of the complaint." Pet. App. E85. In addition, the Judicial Officer specifically rejected petitioners' contention that the results of a palpation examination are insufficient to prove soreness, explaining that "[a]mple precedent exists for finding that a horse was sore, based on the horse's reaction to palpation by the Department's veterinarians." *Id.* at E86. Finally, the Judicial Officer sustained the sanctions imposed by the ALJ. The Judicial Officer noted that "[t]he need for a severe sanction to achieve the remedial purposes of the Act is recognized

² The Judicial Officer's review is *de novo*, and thus is "actually a species of retrial." *Thornton v. United States Department of Agriculture*, 715 F.2d 1508, 1513 (11th Cir. 1983).

in numerous cases.” *Id.* at E89. “Although the disqualification period for first time offenders is normally 1 year, rather than 2 years,” the Judicial Officer continued, petitioners “were found to have entered for exhibition two sores on two separate occasions.” *Ibid.*

c. In a motion for reconsideration, petitioners argued that they were denied a fair hearing. The Judicial Officer rejected that contention, concluding that it “came too late and, in any event, is without merit.” Pet. App. D42.

3. Petitioners sought judicial review in the court of appeals, arguing (1) that there was insufficient evidence that they had violated the Act; (2) that consultations between USDA veterinarians and the attorney who prosecuted the case violated their constitutional rights; (3) that the Department of Agriculture’s enforcement policy was unconstitutional; and (4) that the sanctions imposed on them were unduly harsh. The court of appeals affirmed in an unpublished per curiam order. Pet. App. C40-C41.

ARGUMENT

1. Petitioners’ principal contention is that a determination that a horse is “sore” may not be based solely on palpation of the horse’s legs. Pet. 19-34. There is nothing in the Horse Protection Act, however, that limits the veterinary procedures that may be used to determine whether a horse is sore within the meaning of the statute. Petitioners’ assertion (Pet. 26-27) that the Act requires a horse’s condition to be determined while the horse is moving is without merit. The statutory definition of “sore” expressly includes situations in which, as a result of the use of devices, chemicals, or other means, a horse “suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation,

or lameness when walking, trotting, or otherwise moving." 15 U.S.C. 1821(3) (emphasis added). A horse is presumed to satisfy that standard when "it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs." 15 U.S.C. 1825(d)(5). The statute provides no support for petitioners' contention that an observation of the horse in motion is an indispensable prerequisite for a determination that a horse is sore.³

The question of what diagnostic techniques are most accurate and effective in detecting soring is a matter within the Department of Agriculture's expertise. The agency has long used palpation examinations as the primary method of determining whether a horse is sore. As early as 1976, the USDA recognized that "[i]t is to be expected that in many, if not most, cases under the Horse Protection Act, the only evidence of soring will be the expert opinion of a veterinarian who testifies on the basis of his observation or examination that in his professional opinion, a particular horse was sored by the use of some chemical or mechanical agent, for the purpose of affecting its gait." *Holcomb*, 35 Agric. Dec. 1165, 1167 (1976). Since that time, the agency has often recognized that expert testimony based on a palpation examination may be sufficient, standing alone, to sup-

³ There is also no merit to petitioners' contention (Pet. 34-35) that the agency has improperly equated "soreness" and "sensitivity." The statute recognizes a presumption that a horse is sore if it manifests "abnormal sensitivity" in both of its forelimbs or both of its hindlimbs. 15 U.S.C. 1825(d)(5). In any event, petitioners' complaint is directed at a remark made by the attorney prosecuting the administrative complaint. Petitioners make no effort to demonstrate that the Judicial Officer, let alone the court of appeals, applied an incorrect interpretation of the term "sore."

port a finding that a horse is sore. See, *e.g.*, *Purvis*, 38 Agric. Dec. 1271 (1979). See also *Thornton v. United States Department of Agriculture*, 715 F.2d 1508, 1510-1511 (11th Cir. 1983) (upholding determination that horse was sore based in part on palpation examination).

In the final analysis, petitioners are contending that the ALJ and the Judicial Officer placed too much weight on the results of the veterinarians' palpation examinations. The agency's finding that petitioners' horses were sore is binding, however, if supported by substantial evidence. 15 U.S.C. 1825(b)(2). Each of the horses at issue in this case was examined by two experienced veterinarians. In each case, both veterinarians concluded that the horse was sore within the meaning of the Act. The ALJ examined at length, but found unconvincing, evidence that the horses' reactions were attributable to uneasiness with the examination rather than pain. Reviewing courts are not free to disturb an administrative agency's determination on such a disputed issue of fact. In any event, a claim that an agency has placed too much weight on particular evidence presents no issue calling for this Court's review.

2. There is no merit to petitioners' contention that they were denied due process during the administrative proceedings in this case. See Pet. 36-44. The fact that the attorney prosecuting the administrative complaint conducted a seminar on the Horse Protection Act, which was attended by the veterinarians who testified, did not undercut the fairness of the proceeding. While the combination of prosecutorial and judicial functions in one individual could raise due process concerns, see *Tumey v. Ohio*, 273 U.S. 510, 534 (1927), contact between prosecutorial and investigative officials is neither unusual nor constitutionally suspect. In fact, the Administrative Procedure Act, 5 U.S.C. 554(d), expressly

recognizes that an agency employee performing investigative functions may, in the same case, act as "counsel in public proceedings."

Petitioners had a full and fair opportunity to cross-examine the veterinarians; to expose the basis for their opinions that the horses in question were sore; and to argue their position on how the Act should be applied to the facts of this case. Cross-examination of the prosecuting attorney would have served no useful purpose. In fact, since petitioners did not seek to examine the Department's attorney, this case does not even present the question whether they would have had a right to do so.

3. As petitioners note, the Department of Agriculture has concentrated its enforcement of the Horse Protection Act on Tennessee walking horses. Pet. 45-46. Petitioners contend that this enforcement policy is unconstitutional. Pet. 45-50.

That contention is not properly before this Court, since petitioners did not raise it at any stage of the administrative proceedings in this case. Gov't C.A. Br. 28-29. See *Alacare Home Health Services, Inc. v. Sullivan*, 891 F.2d 850, 855 n.5 (11th Cir. 1990). In any event, the Department of Agriculture has broad discretion in allocating its enforcement resources, cf. *Heckler v. Chaney*, 470 U.S. 821 (1985), and trainers and owners of Tennessee walking horses are not a suspect class entitled to special protection under the equal protection component of the Fifth Amendment.

As the legislative history of the Horse Protection Act indicates, Congress was particularly concerned with the treatment of that breed. H.R. Rep. No. 1597, *supra*, at 2 (Horse Protection Act "is designed to end the inhumane practice of deliberately making sore the feet of Tennessee walking horses in order to alter their natural

gait"); S. Rep. No. 609, 91st Cong., 1st Sess. 1 (1969) (same). It is not a violation of due process or equal protection for the Department to focus its limited enforcement resources on the abuses that led to the enactment of the statute.

4. Finally, petitioners argue that their two-year suspensions were "too severe." Pet. 51. The statute provides, in pertinent part, that a person against whom a civil penalty has been assessed "may be disqualified" from participation in horse shows and exhibitions "for a period of *not less than* one year for the first violation." 15 U.S.C. 1825(c) (emphasis added). The Act confers broad discretion to impose such a sanction on the Department of Agriculture. Contrary to petitioners' contention (Pet. 52), the factors enumerated in 15 U.S.C. 1825(b) apply only "with respect to civil penalties under [Section 1825(c)]," not with respect to disqualifications. 15 U.S.C. 1825(c).

Petitioners make no serious effort to show that the Department abused its discretion in imposing two-year suspensions on each of them. Their only specific complaint (Pet. 52-53) is that the agency erred when, in fixing the period of their suspensions, it attributed both violations to each of them. See Pet. App. E89 ("Although the disqualification period for first time offenders is normally 1 year, rather than 2 years, the respondents here were found to have entered for exhibition two sored horses on two separate occasions."). That determination was based on the fact that petitioners were partners and were both part-owners of one of the horses in question. Under the circumstances of this case, it was not an abuse of discretion to take both violations into account in determining the sanctions for each petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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